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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 812

JULIUS BLACK, ADMINISTRATOR OF THE ESTATE OF DAVID VICTOR BLACK,

Petitioner,

UNITED STATES OF AMERICA and MATHIASEN'S TANKER INDUSTRIES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

In the Matter of the Petition of the UNITED STATES OF AMERICA and MATHIASEN'S TANKER INDUSTRIES, INC., for exoneration from or Limitation of Liability as owners of the USNS MISSION SAN FRANCISCO

JULIUS BLACK, ADMINISTRATOR OF THE ESTATE OF DAVID VICTOR BLACK,

Petitioner,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Administrator of the Estate of David Victor Black, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered 12 September 1966, modifying the judgment of the United States District Court for the District of Delaware, entered 17 December 1964.

Opinion Below

The opinion and supplemental opinion of the United States District Court for the District of Delaware are reported at 236 F. Supp. 895 and 909. The opinion of the United States Court of Appeals for the Third Circuit has not been reported and is printed *infra*, pp. 1a-13a.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on 12 September 1966. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

I. Whether the Suits in Admiralty Act, 46 U. S. C. §§ 741-752, bars a seaman's claim under the Jones Act, 46 U. S. C. § 688, against his employer, the owner *pro hac vice,* who hired him and exercised immediate control over him pursuant to a contract with the United States which expressly provided that he was not an employee of the United States.

II. Whether a seaman's recovery under the Jones Act, 46 U. S. C. § 688 against his employer for loss to dependents is a bar to an independent claim under the Delaware Wrongful Death Act, 10 Del. Code § 3704(b), against the United States of America for the loss to decedent's estate.

Statutes Involved

Jones Act, 46 U. S. C. § 688.

Recovery for Injury to or Death of Seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any

such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (41 Stat. 1007).

Suits in Admiralty Act, 46 U. S. C. § 745.

745. Causes of Action for Which Suits May be Brought; Limitations; Exceptions; Actions Which May Not Be Revived; Interest on Claims.

Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel: *And provided further,* That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such

claim is brought as authorized by Section 742 of this Title unless upon a contract expressly stipulating for the payment of interest. (64 Stat. 1112).

Delaware Wrongful Death Act, 10 Del. Code § 3704 (b)

Whenever death is occasioned by unlawful violence or negligence, and no suit is brought by the party injured to recover damages during his or her life the widow or widower of any such deceased person, or, if there is no widow or widower, the personal representative, may maintain an action for and recover damages for the death and loss thus occasioned.

Statement

This action was initiated by the United States of America and Mathiasen's Tanker Industries, Inc., (hereinafter Mathiasen) jointly filing a petition for exoneration from or limitation of liability as the owner and bareboat charterer respectively of the USNS MISSION SAN FRANCISCO.

The USNS MISSION SAN FRANCISCO and the SS ELNA II collided in the Delaware River on 7 March 1957. The MISSION SAN FRANCISCO was totally destroyed with a loss of ten lives including petitioner's decedent, David Victor Black, the vessel's radio operator. The owner of the SS ELNA II, Oskar Tiedemann and Company, filed a petition for exoneration or limitation which was consolidated for trial with the petition of the United States and Mathiasen.

The right of the United States and Mathiasen to petition jointly was sustained by the United States District Court for the District of Delaware on 7 October 1957. 155 F. Supp. 714. The district court's opinion was affirmed by the Court of Appeals for the Third Circuit on 26 Sep-

tember 1958. 259 F. 2d 608. After a trial on the merits the MISSION SAN FRANCISCO and the ELNA II were found at fault. The petition of the United States and of Mathiasen for exoneration or limitation was denied. The owner of the ELNA II was granted limitation of liability. 179 F. Supp. 227, *aff'd.* 289 F. 2d 237.

The district court appointed a commissioner to ascertain the damages. The commissioner awarded the petitioner (1) damages against Mathiasen under the Jones Act in the amount of $26,575 and (2) damages against the United States under the Delaware Wrongful Death Act in the amount of $36,135. The district court approved the commissioner's awards and directed that prejudgment interest be allowed in the Jones Act award against Mathiasen. A decree was entered against the United States and Mathiasen on both awards on 17 December 1964 pursuant to an opinion of the court dated, 23 September 1964 and a supplemental opinion of the court, dated 16 December 1964. These opinions are reported at 236 F. Supp. 895 and 909.

The United States and Mathiasen appealed from the decree of the district court to the Court of Appeals for the Third Circuit. On appeal the district court's judgment was modified by eliminating all recoveries allowed against Mathiasen and eliminating the award to petitioner against the United States under the Delaware Wrongful Death Act and substituting instead a Jones Act award against the United States. The Court of Appeals said:

> "While in the circumstances of this case the determination of the proper Jones Act respondent is not free from doubt, we have concluded that the United States is liable to Black's estate and to the others similarly situated under the Jones Act. Difficulty arises because Jones Act recovery is normally al-

> lowed only against the complaining seaman's employer, and in this case Mathiasen hired the crewmen and exercised immediate control over them pursuant to a contract with the United States which specified that the members of the crew would be employees of Mathiasen and not of the United States." (*infra*, 10a-11a).

The opinion of the Court of Appeals has not been reported. It is set forth *infra* pp. 1a-13a.

On or about 1 July 1953 Mathiasen entered into a contract with the Military Sea Transport Service (hereinafter M. S. T. S.) for the bareboat charter of certain vessels owned by the United States, including the MISSION SAN FRANCISCO. Under the M. S. T. S. contract the master, officers and crew are expressly stated to be employees of the Contractor and not of the United States. (R*. 70a, 90a). The M. S. T. S. contract further provides that the United States is to reimburse the contractor for the satisfaction of judgments rendered against it arising out of the death of a member of the crew. (R. 89a).

The United States and Mathiasen were found at fault. Mathiasen was negligent in the navigation and operation of the vessel. The United States was negligent in permitting the vessel to sail without the proper equipment to cleanse the vessel's tanks of the highly inflammable gases which had accumulated. 179 F. Supp. 227, *aff'd.* 289 F. 2d 237.

The Court below declared that Mathiasen is an "agent" of the United States within the meaning of the Suits in Admiralty Act, 46 U. S. C. § 745. It substituted the United States as the employer of the deceased seaman Black. It struck the recovery against the United States under the Delaware Wrongful Death Act. It eliminated the prejudgment interest on the Jones Act award from 7 March 1957.

R* refers to Appellants' Appendix in the United States Court of Appeals for the Third Circuit.

Reasons for Granting the Writ

The decision of the Court below is inconsistent with the decisions of this Court in *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783 (1949) and *Powell* v. *U. S. Cartridge Co.,* 339 U. S. 497 (1950). It conflicts with the decisions of the Court of Appeals for the Second Circuit in *Hanlon* v. *Waterman Steamship Corporation,* 265 F. 2d 206 (1959) and with the decision of the Court of Appeals for the Fifth Circuit in *Atlantic Coast Line R. Co.* v. *Agwilines, Inc.,* 195 F. 2d 459 (1952).

In *Cosmopolitan Co.* v. *McAllister,* 337 U. S. 783 (1949), this Court considered the Government's General Agency Agreement. [hereinafter G. A. A.]. The seaman sought a Jones Act award against the General Agent, Cosmopolitan Shipping Company. Previously, this Court had held that a Jones Act claim may only be brought against the claimant's employer. *Lindgren* v. *United States,* 281 U. S. 38 (1930). In denying the Jones Act claim against the General Agent, Cosmopolitan Shipping Company, this Court found that pursuant to terms of the G. A. A. contract the claimant's employer was the United States. The decision in *Cosmopolitan* was codified in the 1950 amendment to the Suits in Admiralty Act, 46 U. S. C. § 745. The Court below said that Section 745 of the act bars any Jones Act claim against Mathiasen. In *Cosmopolitan,* this Court declared that the master and crew were employees of the United States, 337 U. S. at 785, 786. The decision of the Government to have crews on the various vessels as it employees was of grave importance to the Government and was the subject of "careful study." *Id.* at 798. The General Agent under the G. A. A. contract was expressly declared to be an agent of the United States "and not an independent contractor." *Id.* at 795.

A seaman serving in a vessel which is operated under a G. A. A. contract may not maintain a Jones Act action against the General Agent. The MISSION SAN FRANCISCO

was operated under a different contract, an M. S. T. S. contract.

In the M. S. T. S. contract the master, officers and members of the crew are expressly *employees of Mathiasen* and not of the government. (R. 70a, 90a). The Court of Appeals for the Third Circuit in construing the contract held that Mathiasen was a bareboat charterer entitled to all the privileges of that position and subject to all corresponding duties and obligations. *In Re Petition of United States,* 259 F. 2d 608 (1958). At 609, the Court stated:

> "In it [the agreement] Mathiasen agreed to '. . . equip, fuel, supply, maintain, man, victual and navigate the tankers.' It agreed that all tankers turned over to it '. . . shall be redelivered to the Government in such condition as the Government may specify . . .' It agreed that 'The contractor shall procure all personnel necessary to fill the complement of each tanker . . . the officers and members of the crew shall be subject only to orders of the Master or contractor . . . (and) shall be employees of the contractor at all times and not of the government. . . .' Under the article entitled 'Insurance-Liability to Third Parties', it agreed that 'The contractor shall procure from and maintain with a reputable carrier, approved by the Government, such available insurance as the Government . . . shall direct.' And paragraph (d) of that article reads: 'For the purpose of this Article, all officers and members of the crew of said tankers and of any other ships owned by, or operated by or for, the Government, and any other personnel employed in any capacity by the Government, shall be deemed to be third parties, and not employees of the Government.'"

Caldarola v. *Eckert,* 332 U. S. 155 (1947); *Johnson* v. *Emergency Fleet Corp.,* 280 U. S. 320 (1930); *Green* v. *New York and Cuba Mail S.S. Co.,* 215 F. Supp. 554 (S. D. N. Y. 1962) and *Hanlon* v. *Waterman S.S. Corp.,* 265 F. 2d 206 (2d Cir. 1959), *cert. den.* 361 U. S. 822 (1959), construed different contracts that did not declare that the officers and crew were the employees of the charterer and not of the United States.

Moreover in *Hanlon* v. *Waterman Steamship Corporation, supra,* the Court of Appeals for the Second Circuit stressed that under a G. A. A. contract Waterman did not operate the vessel, but merely furnished officers and men for employment by the United States. In 1870 this Court declared that an owner *pro hac vice* is liable for the torts of the vessel. *Thorp* v. *Hammond,* 12 Wall. 408.

The Court of Appeals for the Fifth Circuit in construing a G. A. A. contract ruled that the exclusive remedy of the plaintiff was against the United States under the authority of *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783 (1949). *Atlantic Coast Line R. Co.* v. *Agwilines Inc.,* 195 F. 2d 459 (1952). The Court stressed that the agreement contained no language indicating that the contract was a demise, and it intimated that if the suit were against a bareboat charterer the result would be different when it said at 462:

> "Only one who is owner or owner *pro hac vice,* operating the vessel, is liable for the acts of the master and crew in its navigation and management."

Chowaniec v. *United States,* 149 F. Supp. 251 (S. D. N. Y. 1956), involved an M. S. T. S. contract. There the Government agreed with this petitioner's position. A seaman brought a proceeding in admiralty under the Jones Act

against the United States and the "contractor." In its answer to the libel, the Government as a fifth defense stated:

> "At the times mentioned in the libel, the libelant was employed by Marine Transport Lines, Inc., who operated and managed the U. S. N. S. Tamalpais and accordingly, the United States of America is not a proper respondent."

The Court dismissed the libel against the United States, since it was not negligent, and held the contractor, Marine Transport Lines, liable under the Jones Act.

Congress did not intend that one in the position of Mathiasen be considered an "agent" of the United States within the meaning of the Suits in Admiralty Act. Senate Report No. 2535, 81st Cong. 2d Sess. (1950), 1951 A. M. C. 149-150, states:

> "The bill will not in any way change the existing rights of seamen, under either the Jones Act or the general maritime law, to bring suits in admiralty or at law against their private employers who operate, under *bare-boat charter* or similar arrangements, vessels which are merely owned by the Government." [Emphasis supplied].

The draftsmen of the M. S. T. S. contract complied with the intent of Congress by inserting a provision in the contract prohibiting the Contractor from executing an agreement with the members of the crew of the *Mission San Francisco* which differed from the collective bargaining agreement between Mathiasen and seamen serving in other vessels of Mathiasen that were not the subject of an M. S. T. S. contract. Article 5 (d) of the M. S. T. S. contract provides in part:

> ". . . provided, however, the Contractor shall under no circumstances execute separate labor agreements limited solely to the operation of Government owned tankers." (R. 70a-71a).

The crew members of the MISSION SAN FRANCISCO, signed articles which expressly set forth that they were employees of Mathiasen.

The word "agent" contained in Section 745 of the Suits in Admiralty Act is a word of art referring to a general agent in a contract such as the G. A. A. contract. The rules of private agency are not applicable here. This Court in the *Cosmopolitan* case stated at 790-91:

> ". . . [T]he word 'employment' should be construed so as to give protection to seamen for torts committed against them by those standing in the proximate relation of employer, and the rules of private agency should not be rigorously applied."

The Jones Act was social legislation designed to create a new cause of action. It granted seamen the right to seek redress for injuries. It granted certain relatives of seamen the right to recover for their death.

We respectfully submit that the decision of the Court of Appeals for the Fourth Circuit in *Smith* v. *United States,* 346 F. 2d 449 (1965), *cert. den.* 382 U. S. 878 (1965), should be overruled. The true construction and effect of the M. S. T. S. contract is cogently set forth by Circuit Judge Bell in his dissenting opinion. Judge Bell stated that prior to entering into the M. S. T. S. form of contract the Government was aware of the holding in *Cosmopolitan,* was aware that that decision had been codified in the 1950 amendment to the Suits in Admiralty Act, was aware of the differences between the G. A. A. and the M. S. T. S.

contract, was aware of the decisions in *Hanlon, Atlantic Coast Line R. Co.* and similar cases and yet proceeded to draft a contract differing from the G. A. A. in so many substantial particulars as to take the "contractor" out of the meaning of the word "agent" as expressed in Suits in Admiralty Act. *Smith* v. *United States,* 346 F. 2d 449, 456 (4th Cir. 1965) (Bell, J., dissenting).

The Court's decision in *Powell* v. *U. S. Cartridge Co.,* 339 U. S. 497 (1950), is analogous to this case and is in apparent conflict with the opinion of the Court below. In *Powell,* the Contractor had the same rights and duties as Mathiasen. There as here the contractor was a private corporation operating Government owned property; the parties contracted on cost plus a fixed fee basis; the private corporation was an independent contractor; the contractor was to be reimbursed for all expenses by the Government; the Government reserved large rights of supervision, auditing and inspection; the men operating the Government owned property were to be hired and assigned by the contractor and were to be employees of the contractor. Employees of the United States do not come within the protective provisions of the Fair Labor Standards Act. It was held that the contractor was liable to the workers for over-time wages under the Fair Labor Standards Act.

The Court in *Lindgren* v. *United States,* 281 U. S. 38 (1930), did not hold that the seaman's exclusive remedy was under the Jones Act. It merely held that the seaman's *exclusive remedy against his employer* was under the Jones Act. No prohibition was declared against recovering from another tortfeasor by means of a different legal remedy.

Petitioner did not seek a double recovery. The awards under the Jones Act and under the Delaware Wrongful Death Act did not result in a double recovery, nor was there any overlapping in the awards.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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New York, N. Y. 10005,
7 December 1966.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 15294
15281

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA AND MATHIASEN'S TANKER INDUSTRIES, INC., FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNERS OF THE USNS "MISSION SAN FRANCISCO",

UNITED STATES OF AMERICA,
Appellant in No. 15294

MATHIASEN'S TANKER INDUSTRIES, INC.,
Appellant in No. 15281.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued May 26, 1966

Before: HASTIE and GANEY, *Circuit Judges;* and CLARY, *District Judge.*

OPINION OF THE COURT

(Filed September 12, 1966)

By HASTIE, *Circuit Judge.*

Our opinion today, *In the Matter of the Petition of Oskar Tiedemann and Company,* deals with appeals centering on the liability of Oskar Tiedemann & Co., the owner of the ship Elna II, as imposed by the consolidated decree in which the district court undertook to make final disposition of numerous death and personal injury claims which resulted from the collision of the ships Elna II and Mission

San Francisco. The present opinion deals with those appeals from the consolidated decree which question relief granted to claimants against the United States, as owner, and Mathiasen's Tanker Industries, Inc., as operator, of the naval supply ship Mission San Francisco.

We consider first a contention that under the relevant statutes the United States alone is liable on the seamen's death and personal injury claims and that the additional entry of judgment against Mathiasen's Tanker Industries was error.

The essential facts concerning the ownership and operation of the vessel were pointed out in an earlier stage of this litigation. See 155 F. Supp. 714, *aff'd* 259 F. 2d 608; 179 F. Supp. 227, *aff'd* 289 F. 2d 237. Briefly, Mission San Francisco was an undocumented tanker owned by the United States. At the time of the collision, this tanker was being operated by Mathiasen under a contract with Military Sea Transportation Service, an agency of the United States Navy. The agreement provided that Mathiasen would "manage and conduct the business of the Government with respect to" the tanker and, to that end, would "equip, fuel, supply, maintain, man, victual, and navigate" the ship. Mathiasen supplied a master and a civilian crew. There is no suggestion that under this contract the tanker could be or ever was used except in "the business of the Government", more particularly as a naval supply ship. Affirmatively, the court below found that the vessel had most recently delivered and discharged a cargo of jet aviation fuel for the Navy and was proceeding in ballast on another mission as directed by the Navy when the collision occurred.

Relying on these facts, the claimants here argue that Mathiasen was such a "charterer or owner pro hac vice"

as under established principles of law must respond in damages for harm caused by the negligent navigation of the vessel operated by it. Moreover, it is argued that we already have so decided in affirming the district court's refusal to dismiss Mathiasen's limitation petition, 259 F. 2d 608, and later affirming the decision that the dangerous condition and grossly negligent navigation of the ship were such as to deprive both its owner and its operator of the benefit of limited liability. 289 F. 2d 237.

Our earlier decisions in this case neither considered nor foreclosed the contention now made that the relevant federal statutes provide for recovery against the United States as owner of a public vessel and preclude recovery against Mathiasen as operator for the government, even though but for such legislation the operator might also be liable. A petition for limitation of liability, such as Mathiasen filed here neither admits liability nor waives any defense. *Smith* v. *United States,* 4th Cir., 1965, 346 F. 2d 449, *cert. denied* 382 U. S. 878; *Petition of Spearin, Preston & Burrows,* 2d Cir., 1951, 190 F. 2d 684. It is an anticipatory protective measure to avoid full personal responsibility if liability shall later be imposed. Accordingly, the first decision of the district court and our affirmance of it merely recognized that as the person who operated a ship, employing a master and a crew for that purpose, Mathiasen faced sufficient risk of liability for harm caused by that ship to justify it in asking for a limitation of liability. In that connection, we said merely that "responsibility may well be ascribed to Mathiasen". See 250 F. 2d at 611. This in no way precluded Mathiasen from asserting as a defense later, when injured parties attempted to prove their claims against both the United States and Mathiasen, that the controlling statutes

made the government exclusively liable for Mathiasen's operation of a public vessel.

Similarly, in later affirming the refusal of the district court to grant Mathiasen limitation of liability we held merely that the dangerous condition and improper navigation of the naval ship were such as to deprive anyone who might be responsible for her faults, whether the owner or the operator, or both, of the benefits of limitation of liability. Here again, we neither considered nor decided whether, in the circumstances of this case, the controlling statutes permit recovery against both the government and the operator.

This brings us to the merits of the controversy concerning the liability of Mathiasen. As against the United States the claimants necessarily rely upon the Public Vessels Act, 46 U. S. C. §§ 781-790, and its incorporation of the Suits in Admiralty Act, 46 U. S. C. §§ 741-752, as serving to waive sovereign immunity and to permit and regulate libels against the United States for "damages caused by a public vessel of the United States". 46 U. S. C. § 781. But in thus permitting recovery against the United States, Congress has stipulated that "where a remedy is provided . . . [against the United States] it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent . . . of the United States . . . whose act . . . gave rise to the claim". 46 U. S. C. § 745.

Preliminarily, the claimants urge that Mission San Francisco was not a "public vessel of the United States". But for this contention, we would have thought it too clear for serious argument that a ship owned by the United States and used as directed by the Navy for the transportation of military supplies is "a public vessel of the

United States". However, we must deal briefly with the contention that the manning and operation of the vessel by Mathiasen, a private corporation, make it something other than a public vessel, presumably a merchant ship. We find no case which supports this view. Certainly the two cited by the claimants do not. One of them, *Calmar S.S. Corp.* v. *United States,* 1953, 345 U. S. 446, mentions the Public Vessels Act only tangentially. The issue there was whether a privately owned ship operated for hire on a war mission for the United States was "employed as a merchant vessel", and the Court decided that the ship was so employed. There is no suggestion that in similar circumstances a government owned vessel would be a merchant vessel rather than a public vessel. Equally unhelpful is the claimants' citation of *Geo. W. Rogers Const. Corp.* v. *United States,* S. D. N. Y. 1954, 118 F. Supp. 927. There a government owned ship operated by "civil service employees of the United States" was found to be a public vessel. But this does not imply, as the claimants argue, that only ships operated by such civil service employees are public vessels. We think government ownership and use as directed by the government exclusively for a public purpose suffice without more to make a ship a public vessel. *Smith* v. *United States,* 4th Cir., 1965, 346 F. 2d 449, *cert. denied* 382 U. S. 878; *cf. Bradey* v. *United States,* 2d Cir., 1945. 151 F. 2d 742; *Sbarbaro* v. *United States,* E. D. Pa. 1953, 112 F. Supp. 93.

Despite the status of the ship as a public vessel, the claimants argue that the statutory provision for exclusive liability of the United States is inapplicable here. It is argued that Mathiasen was not "the agent . . . of the United States . . . whose act . . . gave rise to the claim" within the meaning of section 745 of title 46. Undoubtedly,

Mathiasen's faulty navigation of the ship caused the collision. Therefore, the contention must be that Mathiasen was not an "agent of the United States" within the meaning of the statute. Accordingly, we must decide whether in section 745 Congress used "agent" comprehensively to include such a contract operator as Mathiasen was in this case.

As a matter of legal definition, "agent" of the United States is an appropriate characterization of such a contract operator of a public vessel as Mathiasen. The accepted distinction between "servant" and "independent contractor" may place Mathiasen in the latter category, since it is arguable that Mathiasen's day to day working of the ship was not subject to government control. See RESTATEMENT, AGENCY, 2d, § 2. But an independent contractor, no less than a servant may be an agent in that he is employed as a fiduciary, acting for a principal with the principal's consent and subject to the principal's overall control and direction in accomplishing some matter undertaken on the principal's behalf. RESTATEMENT, AGENCY, 2d, § 14 N.

Certainly, under the contract in this case Mathiasen owed the United States obedience and loyalty and was in significant ways subject to the government's direction and control. Mathiasen expressly agreed "to manage and conduct the business of the Government with respect to such tankers" as the government should furnish "solely in the public use or in the protection of the National interest or economy". The government was to prescribe "voyages and cargoes". While Mathiasen undertook to "man, victual and navigate" the ships, the government was empowered "to terminate the employment of the master or any member of the crew" as the public interest

might dictate. Wages of the crew and all costs of operating the ships, though paid by Mathiasen, were reimbursable by the government. We think the general sense and specific details of this agreement disclose a relation of principal and agent within the accepted legal conception of an agency relationship. Another court of appeals has already reached this conclusion in characterizing an identical contract. *Smith* v. *United States, supra.*

This normal reading and application of the language of the contract is in accord with the manifest intention of Congress. On April 8, 1949, when the legislative proposal that became section 745 was before Congress the Attorney General responded to Congressional solicitation of his views by recommending to the Chairman of the House Committee on the Judiciary that Congress make the remedy granted against the government "exclusive of any other action . . . against any employee, agent or instrumentality . . . acting for or on behalf of the United States in the management and operation of its vessels". See H. Rep. No. 1292, 81st Cong., 1st Sess., 1949, p. 4; 1951. A. M. C. 151, 154. This language differed from the text of the bill then before Congress in the inclusion of the phrase "or instrumentality" after the word "agent". Thereafter, in reporting the final and present text to the Congress, both House and Senate Committees explained "that the language suggested by the Department of Justice in respect of the exclusive provision constitutes an immaterial variation in the language of the bill as drawn". H. Rep. No. 1292, *supra* p. 5. This indicates that in the Congressional view the general statement of an agency concept as enacted included any instrumentality through and by which public vessels were operated.

Also noteworthy is the language of a proviso to section 745 which implements the declared exclusive liability of the United States by waiving the statute of limitations in certain cases. The scope of the waiver is stated in terms of any situation in which "any person, partnership, association, or corporation, [is] engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States". The proviso, with its quoted coverage of the present type of contract operation, appears to be *in pari materia* with the preceding direction that the liability of the United States be exclusive. Thus, it may reasonably be inferred that the general agency language in the associated clause on exclusive liability covers the same kind of contractual arrangement.

Even more significant is language used in the "Analysis of the Bill" which is part of a second Senate Report on this legislation. It is there stated that the provision that the liability of the United States shall be exclusive "declares the rule announced by the Supreme Court in *Cosmopolitan Shipping Co.* v. *McAllister* (337 U. S. 783, 1949 A. M. C. 1031), *Caldarola* v. *Eckert* (332 U. S. 155, 1947 A. M. C. 847), and *Johnson* v. *Emergency Fleet Corp.* (280 U. S. 320, 1930, A. M. C. 1)." S. Rep. No. 2535, 81st Cong., 2d Sess., 151 A. M. C. 149, 151. The three cited cases, considered together, cover a variety of circumstances in which governmental maritime activity is conducted through private contractors. One of the cases, *Johnson* v. *Emergency Fleet Corporation,* specifically considers several situations, including that of a contract operator indistinguishable from Mathiasen here, and holds that governmental liability is exclusive. Thereafter, a subsequent decision, unmentioned in the Senate Report, had overruled

that part of the *Johnson* holding which covered cases like ours. *Brady* v. *Rossevelt Steamship Co.*, 1943, 317 U. S. 575. Thus, it is reasonable to infer from the quoted language of the legislative analysis that Congress intended to restore the *Johnson* decision in its entirety and in so doing to make governmental liability exclusive throughout a broad spectrum of contractual arrangements for the operation of public vessels, including the type presented by the Mathiasen contract.

For these reasons we have concluded that, by force of the exclusive liability clause of section 745, any right to recovery against the United States here for injury caused by its public vessel precludes recovery for the same injury against the contract operator whose conduct was the immediate cause of the accident.

It remains to consider the appeals of the United States and Mathiasen from the awards made to the estate of David Black, the radio operator of the public vessel who was killed in the collision. Black's administrator, different from the other death claimants, sought recovery for the economic value of decedent's life under the Delaware Wrongful Death Act, 10 Del. Code Anno. § 3704(b), as well as recovery for the loss to dependents under the Jones Act, 46 U. S. C. § 688. The commissioner awarded $26,575. under the Jones Act and $36,135. under the Delaware Wrongful Death Act, a total of $62,710. The district court, after a discussion in its opinion that suggests liability of the United States under the Delaware Wrongful Death Act and liability of Mathiasen under the Jones Act, "sustained" the findings of the commissioner and entered judgment against both the United States and Mathiasen for the full amount of $62,710. The appellants now argue

that no recovery was permissible against Mathiasen and only Jones Act recovery against the United States.

The United States is suable here because Congress has waived sovereign immunity from liability for damage "caused by a public vessel of the United States". 46 U. S. C. § 781. Accordingly, wherever the faults of a public vessel or its operation are such as would make a private owner liable, personal liability for harm thus caused may be imposed upon the United States. Moreover, as we already have pointed out, if a remedy exists against the United States, section 745 makes that remedy exclusive of any recovery against an agent of the United States whose conduct gave rise to the claim. In this case, the collision was caused by the negligent navigation of a public vessel and resultant damage was multiplied by the dangerous condition of its empty tanks within which highly inflammable gases had been permitted to accumulate and remain. The immediate cause of the collision was the negligent conduct of the contractor Mathiasen to whom the operation of the ship had been entrusted. Thus, if a person injured in the accident has a remedy against the United States, the availability of that remedy precludes recovery against Mathiasen.

Black's claim against the United States under the Jones Act, like the claims made on behalf of the other members of the public vessel's crew who were killed or injured, has been allowed.

But in Black's case, unlike the others, it is now argued that full and proper recovery includes a Jones Act award against Mathiasen and an additional award against the United States under the Delaware Wrongful Death Act.

While in the circumstances of this case the determination of the proper Jones Act respondent is not free from

doubt, we have concluded that the United States is liable to Black's estate and to the others similarly situated under the Jones Act. Difficulty arises because Jones Act recovery is normally allowed only against the complaining seaman's employer, and in this case Mathiasen hired the crewmen and exercised immediate control over them pursuant to a contract with the United States which specified that the members of the crew would be employees of Mathiasen and not of the United States.

The Jones Act does not in terms designate the injured seaman's employer as the person against whom it grants a remedy. However, it does grant the seaman a cause of action for negligent injury in the course of his employment equivalent to that which the Federal Employers' Liability Act, 45 U. S. C. § 51, confers upon railroad workers against their employing carriers. Accordingly, the normal rule is that the seaman's employer, and that employer only, is liable under the Jones Act. *Cosmopolitan Shipping Co.* v. *McAllister,* 1949, 337 U. S. 783. However, the determination of the proper Jones Act defendant in public vessel cases is affected by the exclusive liability provision of section 745. In that section Congress attempted to resolve uncertainties and confusion whether the United States or its contractual instrumentality could be sued, as reflected in a series of maritime cases, several of them Jones Act cases, from *Johnson* v. *Fleet Corp.,* 1930, 280 U. S. 320 to *Cosmopolitan Shipping Co.* v. *McAllister,* 1949, 337 U. S. 783. This was accomplished if section 745 is construed as designating the United States rather than its agent as the entity suable on all claims for harm done by a public vessel as a result of the agent's conduct. *Cf. Richmond Screw Anchor Co.* v. *United States,* 1928, 275 U. S. 331 (construing and applying a similar provision concerning patent in-

fringement by government contractors). The logical implication of this statutory designation of the party to be held responsible is to impose liability on the United States in Jones Act cases whether it or its operating agent is conceptually the seaman's employer. *Cf. North Carolina R. R. Co.* v. *Zachary*, 1914, 232 U. S. 248. Indeed, any other construction would perpetuate the very uncertainty as to whom a seaman should sue for injury caused by a public vessel which Congress has sought to eliminate.

This substitution is fair and reasonable. We are here concerned with the situation of a vessel both owned by the United States and engaged exclusively in the business of the United States. This is quite different from the ordinary demise in which the charterer uses the vessel for his own purposes and the owner has no interest in the activity of the chartered ship. Therefore, even if in a technical view a particular arrangement for the operation of a public vessel may make the contract operator the "employer" of the crew, the vessel and its crew are serving the United States.

In these circumstances the scheme and the remedial purpose of the legislation are best served by construing section 745 as permitting an employer's Jones Act liability to be imposed upon the United States vicariously.

It remains only to consider briefly whether, as against the United States, both Jones Act relief and a recovery under the Delaware Wrongful Death Act are permissible. The short answer is that the Supreme Court has clearly ruled that the Jones Act remedy is exclusive and, when applicable, bars relief against the same defendant under a state wrongful death statute. *Gillespie* v. *United States Steel Corp.*, 1964, 379 U. S. 148; *Lindgren* v. *United States*,

1930, 281 U. S. 38. Thus, Black's estate can recover only under the Jones Act.

On this appeal the consolidated decree will be modified by eliminating all recovery allowed to the several claimants against Mathiasen's Tankers Industries, Inc. and by eliminating from the award to Julius Black as Administrator of the Estate of David B. Black against the United States all recovery allowed under the Delaware Wrongful Death Act, with costs to the appellants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 15294
15281

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA AND MATHIASEN'S TANKER INDUSTRIES, INC., FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNERS OF THE USNS "MISSION SAN FRANCISCO",

MATHIASEN'S TANKER INDUSTRIES, INC.,
Appellant in No. 15281.

UNITED STATES OF AMERICA,
Appellant in No. 15294.

(D. C. No. 1765 In Admiralty)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: HASTIE and GANEY, *Circuit Judges,* and CLARY, *District Judge.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that on this appeal the consolidated decree of the District Court, filed December 17, 1964, be and hereby is modified by eliminating all recovery allowed

to the several claimants against Mathiasen's Tankers Industries, Inc. and by eliminating from the award to Julius Black as Administrator of the Estate of David B. Black against the United States all recovery allowed under the Delaware Wrongful Death Act, with costs to the apellants.

ATTEST:
IDA O. CRESKOFF
Clerk

September 12, 1966

FILED
JAN 10 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966.

No. 960

RUTH ELIZABETH ALLEN, Executrix of the Estate of WILLIAM C. ALLEN, Deceased, and forty-four others herein specifically identified,

Petitioners,

v.

MATHIASEN'S TANKER INDUSTRIES, INC., and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No.

RUTH ELIZABETH ALLEN, EXECUTRIX OF ESTATE OF WILLIAM C. ALLEN, DECEASED, AND FORTY-FOUR OTHERS HEREIN SPECIFICALLY IDENTIFIED,

Petitioners,

v.

MATHIASEN'S TANKER INDUSTRIES, INC., AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Ruth Elizabeth Allen, Executrix of Estate of William C. Allen, deceased, Theodora Andanar, Administratrix of Estate of Thomas Andanar, deceased, Gloria Jean Reneau, Administratrix of Estate of Edward L. Reneau, deceased, Pierre B. Baird, Harold G. Barton, William C. Bausch, Bernie A. Brown, Howard P. Chittick, Herbert Cook, Herminio I. Costa, Kenneth E. Cross, Pablo Cruz, Henri R. Desrochers, Gerald F. Duffy, Frank Fontes, Charles Fuller, William E. Galligan, Anthony Guzowski, Gerard M. Herman, Robert L. Jamison, William L.

Kavanagh, Alton C. Kennedy, Willie Locke, Joseph A. Martel, Thomas J. Martin, Eugene A. McKenna, Verart Miranda, Oscar E. Nelson, Joseph F. O'Neill, Albert D. Pereira, Booker T. Pompey, Thomas C. Redmond, Charles Ben Salus, Clinton Sampa, Warren M. Singletary, Daniel P. Tabella, Luther Walker, Timothy Bodden, Fulvio Carrion, Orlando Jiminez, Wilbert Benjamin Levy, George C. Malvar, Kenrick Rodriguez, George D. W. Sprott and Richard Yhap, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on September 12, 1966.

OPINIONS BELOW.

The opinion of the United States District Court for the District of Delaware, reported at 236 F. Supp. 895, is printed in the Appellants' Appendix (p. 4a) for use of the Court below, nine copies of which are filed herewith. The supplemental opinion of said District Court, reported at 236 F. Supp. at 909 is also printed in said Appellants' Appendix (p. 38a). The part of the Final Decree of said District Court relevant to this petition is printed as Appendix B hereto. The opinion of the United States Court of Appeals for the Third Circuit, reported at — F. 2d — is printed as Appendix C hereto. The Judgment of said Court of Appeals is printed as Appendix D hereto.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 12, 1966 (Appendix D). The time within with to file this petition for a writ of certiorari was extended to January 11, 1967, by this Court in an Order signed by Mr. Justice Brennan. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

Where the Government contracts out its vessel to a private operator, and the agreement expressly provides that the private operator shall be an "independent contractor" with the responsibility to "operate, control, equip, maintain and man" the vessel, and that the master and crew shall be "employees of the private operator" and "not employees of the Government"; in a suit by seamen and their representatives against the private operator, their employer, to enforce claims for injuries and death:

(a) Is such an independent contractor an "agent" of the United States under the Suits in Admiralty Act, 46 U. S. C. A. 745, which makes the United States solely liable for the torts of its "agent or employee", or is the independent contractor liable for its own torts and misconduct which caused a marine disaster?

(b) Is the liability of the United States for interest on a judgment against it governed by the Suits in Admiralty Act, which provides for interest from the date the suit is started, or by the Public Vessels Act, 46 U. S. C. A. 782, which provides for interest from the date of judgment?

STATUTES INVOLVED.

The statutes involved are the Limitation of Liability Act 46 U. S. C. A. 183, 185, 186; the Suits in Admiralty Act, 46 U. S. C. A. 745; the Public Vessels Act, 46 U. S. C. A. 781, 782.

STATEMENT OF THE CASE.

The S/S "Mission San Francisco", a United States owned vessel, was contracted out to Mathiasen's Tanker Industries, Inc. under an agreement which made the latter an "independent contractor", giving Mathiasen the duty and responsibility, inter alia, to "operate, control, equip, maintain and man the vessel". Moreover, the agreement further specified that the master and crew *be employees of Mathiasen* and *not* employees of the United States. Mathiasen was operating the vessel admittedly as an owner "pro hac vice" on March 7, 1957, when it came into collision with the S/S "Elna II", and suffered violent explosions which blew out her sides and engulfed her in flames. Many men were lost, and the remainder suffered serious personal injuries.

Mathiasen and the United States both filed petitions to limit liability and for exoneration. Mathiasen's right to limit was challenged by a motion to dismiss on the ground that it was merely an agent of the United States and not an owner or charterer of the vessel, as required by the statute. The United States and Mathiasen there both contended that the agreement between them made Mathiasen an "independent contractor" and an owner "pro hac vice" and *not* an "agent" of the United States. The District Judge sustained those contentions and denied the motion to dismiss. On appeal, the Third Circuit Court of Appeals affirmed, holding Mathiasen under the agreement to be an "owner" or "bareboat charterer", with full right to obtain a judgment in its own behalf independently of the United States (259 F. 2d 608).

After trial, both Mathiasen and the United States were found liable for the disaster and both held in privity with the causes of the disaster. Accordingly, both limitation and exoneration were denied, and judgments were entered against Mathiasen individually and against the United States. Both Mathiasen and the United States appealed,

and the individual judgments *against each* of these defendants were affirmed on the merits. 289 F. 2d 237.

Hearings on damages were thereafter held and judgments for specific amounts were entered in each of the forty-five cases, on December 17, 1964, almost eight years after the tragedy. Because of the extraordinary delay, the claimants' counsel moved for interest on the awards, and the court allowed four per cent interest from the date of the accident against Mathiasen, and four per cent against the United States from the date of the judgment, under the Public Vessels Act, 46 USCA 782.[1]

At this point in the case, in order to avoid the payment of interest, Mathiasen and the United States completely reversed themselves. Five years after the judgment against Mathiasen had been affirmed on the merits by the Court of Appeals below, on the second appeal, they now contend that Mathiasen was merely an "agent" of the United States, that it was immune from suit and that no judgment could be entered against it. The District Court ruled against Mathiasen and entered a judgment for interest in addition to the principal sum. On appeal, the Court of Appeals below ignored its own prior judgment, entered eight years before, which had become the law of the case. 259 F. 2d 608. The Court below (not the same panel which had decided the earlier appeals) by a process of tortured reasoning, also reversed its prior interpretation of the term "agent" in the Suits in Admiralty Act and extended it to include vessel operators who were "owners pro hac vice", "independent contractors", "employers of the seaman crews" and others in contractual relationship with the United States. The Court below, accordingly, reversed the judgment of the District Court granting interest to the claimants for the eight-year delay caused by the litigation.

---

1. The Public Vessels Act allows interest only from the date of the judgment, while the Suits in Admiralty Act 46 USCA 745 allows interest from the date the suit is started.

REASONS RELIED ON FOR GRANTING THE WRIT.

I. The decision of the Court below so misconstrues the term "agent" in the Suits in Admiralty Act, 46 U. S. C. A. 745, as to substantially extend it and give immunity to an "independent contractor", who is also an "independent employer". That decision is in flat conflict with the rule laid down by this Court in *Cosmopolitan Shipping Co. v. McAllister,* 373 U. S. 783, and with the decision of the Court of Appeals for the Second Circuit in *Hanlon v. Waterman S. S. Co.,* 265 F. 2d 206, and the decision of the Court of Appeals for the Fifth Circuit in *Atlantic Coast Line R. R. v. Agwilines,* 195 F. 2d 459, which hold that the term "agent" is limited to "shoreside" "ships' husbands" who do not operate the vessels, who are not independent contractors or owners "pro hac vice", and who are not employers of the seamen who man the vessels. On the contrary, this Court and the Second and Fifth Circuit Courts of Appeals, in construing this Court's decision and the Suits in Admiralty Act, hold, in direct conflict with the Court below, that such contractors, operators and employers are fully responsible for their own torts and are not immunized from liability by the Suits in Admiralty Act. To the contrary is the decision of the Court of Appeals for the Fourth Circuit in *Smith v. United States,* 346 F. 2d 449. The Court below adopted the view of the Fourth Circuit and rejected that of the Second and Fifth Circuits. This irreconcilable conflict with this Court and among the Circuits requires review by this Court.

II. In determining whether the Suits in Admiralty Act or the Public Vessels Act applies in determining the liability of the United States, the Court below relied solely on the criteria that the vessel was owned by the United States and was carrying cargo as directed by the United States, in reaching the conclusion that it was a "public vessel". It

disregarded completely the paramount criteria relating to the character of the private operator as an "owner pro hac vice", as an independent contractor, or as an employer of the crew. This holding of the Court below is in conflict with the ruling of this Court in *Calmar S. S. Corp. v. United States,* 345 U. S. 446, which held that the Government's ownership of the vessel and the Government's control over the cargo to be carried did not determine the character of the vessel. On the contrary, this Court said the fact that the master and crew were employed, controlled and paid by the shipping company was the paramount and dominating criterion which fixed the character of the vessel as a "merchant" rather than a "public" vessel, despite the fact that the vessel was Government owned and carried "war materiel".

I. The Amendment of 1950 to the Suits in Admiralty Act Was Intended to Revive the Rights of Action Against the United States Which Had Been Lost Because They Had Previously Been Erroneously Filed Against Private Companies Which Had Engaged Solely in Shoreside Activities on Behalf of the United States. In These Revived Suits in Which the United States Was Made Solely Liable, the Shoreside Agents Were Immunized From Liability. The Amendment Was Not Intended to Insulate From Liability Private Operators, Owners "Pro Hac Vice" or Private Employers of the Crews of Government-Owned Vessels From the Consequences of Their Own Torts.

One of the basic purposes of the Suits in Admiralty Act (46 U.S.C.A. 741, et seq.), as originally enacted in 1920, was to wipe out the right to attach Government owned vessels in actions *in rem.* In place of that *rem* action, the Act substituted an action *in personam* against the United States. In the period that followed, civil suits demanding jury trials were brought against private agents employed by the United States as "ships' husbands" to operate the

accounting and certain other shoreside business of its vessels under the wartime standard form of general agency agreement (GAA 4-4-42, 7 Fed. Reg. 7561, 46 Code of Fed. Reg., 1943 Com. Supp. p. 11427, Sec. 306.44). In *Hust v. Moore-McCormack,* 328 U. S. 707, this Court held, in a case based upon that general agency agreement that "despite the absence of the common law employer-employee relationship between the agent and the seamen on vessels operated by the Government under general agency, the seamen could bring the statutory Jones Act suits against the agent." The question was again presented to this Court in *Caldarola v. Eckert,* 332 U. S. 155, and this Court reversed its prior ruling and held that ships' husbands or shoreside agents under the general agency agreement were *not* owners pro hac vice, operating agents for the voyage of Government vessels. The action was dismissed because the agent was *not* an operating agent. The decision in *Caldarola* resulted in the dismissal of a substantial number of suits which had been brought against the shoreside agents on the authority of the *Hust* decision. By this time, the two-year statute of limitations barred any action against the United States in those cases. It was to remedy this situation that Congress enacted the Amendment of 1950 to the Suits in Admiralty Act. That Amendment was expressly designed to revive the expired actions against the United States without creating any new right of action against the "agents" who performed solely the shoreside activities under the general agency agreement. The shoreside agents were, therefore, immunized from liability in the 1950 Amendment. The Amendment was not intended to disturb the existing law relating to the liability of operating agents, owners pro hac vice or private employers of seamen on Government-owned vessels. The legislative history and the language of the Act itself make this abundantly clear. (Senate Report No. 1782, 1950—House Report No. 1292, 1950—U. S. Code Cong. Service, 81st Cong. 2nd Session 1950. See also Statement of Department of Justice, April 8, 1949—1951

AMC 151). The decisions of the Courts of Appeals for the Second and Fifth Circuits have so construed the Act in *Hanlon v. Waterman S. S. Co.*, 265 F. 2d 206, and *Atlantic Coast Line R. R. v. Agwilines*, 195 F. 2d 459. The Court of Appeals for the Fourth Circuit, in *Smith v. United States*, 346 F. 2d 449, has construed it to the contrary.

In enacting the 1950 Amendment to the Suits in Admiralty Act, Congress expressly relied on the decision of this Court in *Cosmopolitan Shipping Co. v. McAllister*, 373 U. S. 783, for the definition of the term "agent" as used in the Amendment. In *McAllister*, this Court defined and limited "agents" to those who were engaged solely in shoreside activities and played no part in the operation of the vessel, and were *not* in an employer-employee relationship to the crew. That case leaves not the slightest doubt that operating agents or employers of the crew are *not* "agents" within the meaning of the 1950 Amendment. The legislative history, the Senate and House Reports, and the statement of the Dept. of Justice which introduced the legislation, spell that out in the clearest possible terms.

The Court below construed the term "agent" in the Act so broadly as to include operating agents, owners "pro hac vice", employers of the crews, and all other independent contractors, stating that this satisfied the "manifest intention of Congress". There is not one word in the statute nor in the entire legislative history to justify or support such a conclusion. That holding ignores the *McAllister* decision and disputes the reasoning of the Second and Fifth Circuits in *Hanlon v. Waterman, supra,* and *Atlantic Coast Line R. R. v. Agwilines, supra.* Indeed, the holding of the Court below is even in irreconcilable, absolute conflict with *its own* prior decision in this very case. When this action was first filed, a motion was made to dismiss the Mathiasen petition for limitation of liability on the ground that it was not an "owner" of the vessel. The District Court denied the motion to dismiss. The Court below, on appeal, after a careful review of the agreement

and the relationship between Mathiasen and the United States, stated in the most unequivocal terms that Mathiasen was an "owner pro hac vice" with the same rights and responsibilities as an owner and an employer and, therefore, held that Mathiasen was entitled to have a judgment entered for or against it in the limitation proceeding after a trial on the merits. The case was remanded for trial, and judgment was entered against Mathiasen on the merits. 179 F. Supp. 227. On appeal, the Court below affirmed that judgment against Mathiasen on the merits. 289 F. 2d 237. That decision became the law of the case, so far as Mathiasen was concerned. The case was again returned for the assessment of damages, and judgment was entered against Mathiasen for specific amounts in each of the forty-five cases. It was at this point that Mathiasen flipped over, contending, directly contrary to its former position, that it was now a mere "agent" entitled to exemption from liability under the 1950 Amendment. The District Court followed the guidelines enunciated by this Court in *McAllister* and by the language of the statute itself, and endorsed the view of the Second and Fifth Circuits. In overruling the District Court decision, the Court below rendered a decision which not only repudiates the rule of this Court in *McAllister* and rejects the reasoning of the Second and Fifth Circuits,[2] but it also has no equitable or legal basis to support it. On the contrary, it would introduce a new doctrine which would insulate a tortfeasor from the consequences of his own misconduct no matter how disastrous those consequences might be, as in the instant case. Such a precedent is fraught with peril and it is an open invitation to reckless and indifferent operators to ignore and violate safety standards and protective rules. That this

2. The Government and Mathiasen, in addition to being bound by the law of the case, are estopped from reversing their former position and contending that Mathiasen was insulated from liability; *Callanan v. United States*, 345 U. S. 507, where this Court held that a party "cannot blow hot and cold". See also *Admiral Towing Co. v. Woolen*, 290 F. 2d 641 (9 Cir., 1961).

was in direct conflict with the legislative intent is clearly evident from the language of the Act itself and most specifically from the legislative history. Senate Report No. 2535, 81st Cong. P. L. 877, 1951 A. M. C. 149-50 discloses:

> ". . . . the bill will not in any way change the existing rights of seamen, under either the Jones Act or the General Maritime law, to bring suits in Admiralty or at law against their private employers who operate, under bareboat charter or similar arrangements, vessels which are merely owned by the Government . . . ."

The Attorney General's statement on behalf of the Department of Justice clearly defines the purpose, scope, and particularly the exclusionary provision, in its report to the legislative committee on the proposed 1950 Amendment as follows (1951 A. M. C. 152):

> "Both bills are intended to relieve a small number of litigants, whose rights to sue the United States under the Suits in Admiralty and Public Vessels Acts have been permitted by their attorney to become time barred in consequence of the confusion regarding the absence of liability of the ship's husbands or shore-side agents employed by the Government to operate the accounting and certain other shore-side business of its vessels under the wartime standard form general-agency agreement (GAA 4-4-42, 7 Fed. Reg. 7561, 46 Code of Fed. Regs., 1943 Com. Supp. p. 11427, sec. 306.44). Such ships' husbands or shore-side agents were held by the Supreme Court in *Caldarola v. Eckert* (332 U. S. 155, 1947 A. M. C. 847), not to be owners *pro hac vice*—operating owners for the voyage of the Government's vessels—as were the operating agents to whom the Government demised its vessels in peacetime. *Not being operating agents in possession and control of the vessels,* such general agents, were they

employed by private shipowners, would, of course, not be subject to vicarious liability for the negligence of the master and crew engaged to manage and navigate the vessel as agents and employees of the vessel's operating owner." (Emphasis supplied.)

The Attorney General, in this same report to Congress on the proposed legislation, explained that the confusion which led to the bringing of civil actions with jury trials against the "agent" under the General Agency Agreement, resulted from this Court's decision in *Hust v. Moore-McCormack,* 328 U. S. 707, where it was held that such suits could be maintained against the general agents. The Attorney General pointed out the crucial and highly-significant factor that, in the *Hust* case (1951 A. M. C. 152):

> ". . . The Supreme Court without discussion accepted the admission in the agent's answer that *it was an operating agent* for the Government and held that despite the absence of the common law employer-employee relationship between the agent and the seaman on vessels operated by the Government under General Agency, *the seaman could bring the statutory Jones Act suits against the agent.* No determination was made by the Supreme Court as to the seaman's right to recover in such an action, but *if the agent were in fact the operator of the vessel, liability would follow.* Prior to the Caldarola case, attorneys representing seamen and other third parties, however, misinterpreted the Hust case as holding not only that a seaman might bring the statutory Jones Act suit against the agent, although the latter was not his employer, but might recover from the agent as if it were in fact operating the vessel so as to be responsible for the negligence of the master and crew." (Emphasis supplied.)

Thus, the Government's official position, expressed by its chief law officer, is that the term "agent" in the 1950

Amendment to the Suits in Admiralty Act does not extend to or include "operating agents" or private operators who stand in the "employer-employee" relationship with the vessel's crew; that as to the latter, the Act was not intended to provide immunity from suit, but, on the contrary, that they should be responsible for their own torts. The law was expressly left intact with respect to operating agents and private employers (Senate Report 1951 A. M. C. 151).

The instant case presents a set of facts which the Senate Committee, the Attorney General, this Court, and the Second and Fifth Circuit Courts of Appeals, have stated describes precisely a private operator *and* an employer-employee relationship between the private operator and the master and crew, which falls *outside* the category of "agent" within the meaning of the Suits in Admiralty Act.

The contract in the instant case is not merely different, but is expressly opposite the "agency" agreement in their major and vital aspects. First of all, the instant contract describes Mathiasen as a "contractor" (34a), who must "equip, fuel, supply, maintain, *man*, victual and *navigate*" the vessel (69a). Throughout the contract, Mathiasen is referred to as an independent contractor. The general agency agreement (32-A C. F. R. p. 150) provides that the vessel is operated *by an agency of the United States*, and its master, officers and crew *are employees of the United States*. The contract in the instant case provides that the master, officers and crew are "employees of the contractor at all times and not of the Government" (70a). Under the "agency" agreement, the master and crew are subject only to orders of the Government, while under the instant contract, the master and crew "shall be subject only to orders of the contractor" (70a). Article 13(d) of the instant contract provides specially that in all suits or claims, all officers and members of the crew shall be deemed third parties and not employees of the Government (90a). Significantly, in the "agency" agreement, the private com-

pany is referred to throughout as the Government's "agent", while in the instant contract, the private company is referred to solely as an independent contractor.

The two contracts are as different as day is from night. It is clear that Congress did not intend to change the existing law or to take away from litigants the basic right to sue an operating agent or an employer of the seamen. It simply insulated from suit those "agents" who had no part in the operation of the vessel or who did not employ the crew. It had already been decided in *Caldarola* that these agents had no liability for the misconduct of the officers and crew, and Congress was simply maintaining the status quo in this respect.

The decision of the Court below would change this well-established rule. In the process, it would take away from the seamen the existing right to jury trial; it would cut down the statute of limitations from three to two years; it would take away the seamen's right to interest from the date of the accident, inter alia.

In reaching its decision, the Court below followed the view of the Fourth Circuit in *Smith v. United States,* 346 F. 2d 449. In that case, the majority said it was "in the national interest" to deprive the seamen of their Jones Act and other rights against the independent contractor employers. A vigorous bristling dissent was filed by Circuit Judge Bell in that case, pointing out the legal deficiencies in the reasoning of the majority. He concluded by stating that since the Government, with full knowledge of the types of relationship available, chose to create a relationship of independent contractor instead of a general agent, it clearly demonstrated the intention that the company be liable for the torts arising from the operation of the vessel and of its employees.

The decision below violated the rule of liability applicable to operating agents and employers, as enunciated by this Court in *McAllister.* It is in conflict with the inter-

pretation of the 1950 Amendment to the Suits in Admiralty Act of the Second Circuit Court of Appeals in *Hanlon v. Waterman S. S. Co., supra,* and of the Fifth Circuit Court of Appeals in *Atlantic Coast Line R. R. v. Agwilines, supra.* It is also in conflict with its own prior ruling in the instant case, and it is in conflict with the Government's representations to the legislative committee urging passage of the bill.

Apart from Constitutional questions which may be involved,[3] a review by this Court is essential to clear up the conflict and prevent the loss of substantial rights by maritime litigants.

II. A Government-Owned Vessel Carrying Government Cargo, But Which Is Privately Operated and Manned by a Crew Employed by the Private Operator, Is a "Merchant" Vessel Governed by the Suits in Admiralty Act and Not by the Public Vessels Act.

The Court below held that Government ownership of a vessel used to carry Government cargo "suffice without more to make a ship a public vessel". It ignored completely the most important factors showing that the vessel was operated and controlled by a private operator, for profit, and manned by a civilian crew employed by the private operator.

The fallacy in the lower court's reasoning is demonstrated by the fact that the private operator is not a public agency, and the civilian crew are not employees of the Government, nor subject to the control or direction of the Government. Actually, the vessel is operated as a private vessel in the same manner as are privately-owned vessels. Indeed, the holding of the Court below, if carried to its logical conclusion, would make public vessels of all vessels presently carrying war cargo to Viet Nam. These vessels include not only American flag, privately-owned and op-

3. Seventh Amendment to the United States Constitution.

erated vessels, but also foreign flag vessels chartered by the United States to carry military cargo to the war zone with foreign crews employed by foreign shipowners. Certainly, Government ownership is not the major criterion because such vessels may be and are legally chartered to private shipping companies for private use. Similarly, the nature of the cargo is not a dominant criterion because such cargo is carried by foreign as well as by American privately-owned and operated vessels. The character of the vessel must be determined by the nature of her crew, which this Court has held to be as vital a part of the vessel as the hull itself, and by the character of the operator. *Cf., Boudoin v. Lykes Bros.*, 348 U. S. 336 (1955). Where the Government is the operator and the crew are servants of the United States, this directly imports a public character to the vessel, but where the operator is private and engaged solely in a profit-making operation and the crew is private and civilian, it is incongruous to say that the vessel is a public vessel.

In *Calmar S. S. Corp. v. United States*, 345 U. S. 446, a vessel had been chartered to the Government for the transportation of munitions and other military cargo. Suit was brought for the loss of the vessel and for additional hire and the Court was required to determine whether the Suits in Admiralty Act or the Public Vessels Act was the proper vehicle for the suit. The Court below held the vessel was a public vessel because she carried "war materiel". This Court reversed, holding that she was a *merchant* vessel because of the vital fact, inter alia, that the master, officers and crew were employed, controlled and paid by the shipping company, so that despite her public military mission, she was *not* a "public vessel". In that case, the Court of Appeals held that "the nature of the cargo is a necessary criterion", but this Court rejected that "cargo test of jurisdiction" (U. S. at 456, n.).

In the case at bar, the Court below ignored that part of this Court's decision which held that the employment

and nature of the crew were the dominant criteria, and it rested its decision on the "cargo test of jurisdiction", which this Court held to be inconsequential and not a factor. In the instant case, the vessel was owned by the United States, but it was contracted out to Mathiasen under an agreement that made Mathiasen the private operator,[4] and the employer of the crew. The agreement divorced the Government from the operation of the vessel and specifically took itself out of any employment relationship with the crew (Paragraph 5(c)). The vessel was operated by Mathiasen for profit, another factor which militates against any suggestion of public character.

In *George W. Rogers Constr. Corp. v. United States,* 118 F. Supp. 927 (S. D. N. Y. 1954), Judge Leibell distinguished between a public and a private vessel on the basis of the criteria which this Court outlined in the *Calmar* case. There, the vessel was owned and operated by the United States Government and a shipping company acted as *general agent.* The vessel had been manned by *civil service* officers and a crew paid by the United States. In following the guidelines laid down by this Court, Judge Leibell held (at 934):

> "A vessel owned absolutely by the United States through the Maritime Commission and operated by officers *who are civil service employees of the United States* and by a crew paid by the United States through its general agent is a 'public vessel' within the purview of the Public Vessels Act . . . unless it is engaged in transporting cargo for hire to a private shipper."

Thus, the New York Court, in following the principles outlined by this Court in the *Calmar* case, concluded that even where the vessel was Government-owned and operated, with a Government employed crew, the vessel would,

4. Indeed, under the agreement which gave Mathiasen control over the vessel and crew, Mathiasen became an owner "pro hac vice". See *Thorp v. Hammond,* 12 Wall. 408, 416.

nevertheless, be a "merchant" vessel, if, in fact, it was engaged in transporting cargo for "hire". This demonstrates the importance of the profit motive in the determination of the public character of a vessel.

The decision of the Court below would change the criteria for the determination of the character of a vessel as pronounced by this Court. It would deprive seamen and other litigants of valuable rights, including the right to interest for the delays which are incident to the litigation, particularly where the Government is involved. In this case, the litigation was protracted for almost eight years, during which time no funds where forthcoming to the needy seamen. The admiralty doctrine of interest from the date of the accident was born to alleviate this very situation. In this area, Congress provided for the interest under the Suits in Admiralty Act from the date of the starting of the suit. Under the Public Vessels Act, the interest begins to run only from the date of the final judgment.

The conclusion reached by the Court of Appeals with respect to the character of the vessel will have wide ramifications in many other areas, depriving seamen and other litigants of long-established and hard-won benefits over the years. A review by this Court is desperately necessary to prevent the confusion and loss of rights which will result from the decision of the Court below.

CONCLUSION.

It is respectfully submitted that the Suits in Admiralty Act was never contemplated, as the Court below held, to include a private operator or an independent contractor or an employer of the crew of a Government-owned vessel within the term "agent", or to grant immunity from suit to these entities. Further, the Court below committed serious prejudicial error and departed from the rule stated by this Court in distinguishing between a public and a merchant vessel. These errors of the Court below will result in great confusion and loss of rights and remedies

to a vast segment of the community, including all seamen and other maritime personnel. Certiorari should be granted to correct this very serious situation.

Respectfully submitted,

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Counsel for Petitioners.

APPENDIX A.

Limitation of Liability Act (46 USCA).

* * *

§ 183. Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel".

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided,* That there shall not be included in such

tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title. R. S. § 4283; Aug. 29, 1935, c. 804, § 1, 49 Stat. 960; June 5, 1936, c. 521, § 1, 49 Stat. 1479.

* * *

§ 185. Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee.

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and

in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. R. S. § 4285; June 5, 1936, c. 521, § 3, 49 Stat. 1480.

* * *

§ 186. Charterer may be deemed owner.

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof. R. S. § 4286.

* * *

Suits in Admiralty Act (46 U. S. C. A.).

* * *

§ 745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims.

Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee

of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel: *And provided further,* That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 742 of this title unless upon a contract expressly stipulating for the payment of interest. Mar. 9, 1920, c. 95, § 5, 41 Stat. 526; June 30, 1932, c. 315, 47 Stat. 420; Dec. 13, 1950, c. 1136, 64 Stat. 1112.

* * *

Public Vessels Act (46 U. S. C. A.).

* * *

§ 781. Libel in admiralty against or impleader of United States.

A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920. Mar. 3, 1925, c. 428, § 1, 43 Stat. 1112.

§ 782. Venue of suit; application of provisions of chapter 20.

Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the Unted States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case non of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest. Mar. 3, 1925, c. 428, § 2, 43 Stat. 1112.

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APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 15294
15281

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA AND MATHIASEN'S TANKER INDUSTRIES, INC., FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNERS OF THE USNS "MISSION SAN FRANCISCO",

UNITED STATES OF AMERICA,
Appellant in No. 15294

MATHIASEN'S TANKER INDUSTRIES, INC.,
Appellant in No. 15281.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued May 26, 1966

Before: HASTIE and GANEY, *Circuit Judges;* and CLARY, *District Judge.*

Opinion of the Court.

(Filed September 12, 1966)

By HASTIE, *Circuit Judge.*

Our opinion today, *In the Matter of the Petition of Oskar Tiedemann and Company,* deals with appeals centering on the liability of Oskar Tiedemann & Co., the owner of the ship Elna II, as imposed by the consolidated decree

in which the district court undertook to make final disposition of numerous death and personal injury claims which resulted from the collision of the ships Elna II and Mission San Francisco. The present opinion deals with those appeals from the consolidated decree which question relief granted to claimants against the United States, as owner, and Mathiasen's Tanker Industries, Inc., as operator, of the naval supply ship Mission San Francisco.

We consider first a contention that under the relevant statutes the United States alone is liable on the seamen's death and personal injury claims and that the additional entry of judgment against Mathiasen's Tanker Industries was error.

The essential facts concerning the ownership and operation of the vessel were pointed out in an earlier stage of this litigation. See 155 F. Supp. 714, *aff'd* 259 F. 2d 608; 179 F. Supp. 227, *aff'd* 289 F. 2d 237. Briefly, Mission San Francisco was an undocumented tanker owned by the United States. At the time of the collision, this tanker was being operated by Mathiasen under a contract with Military Sea Transportation Service, an agency of the United States Navy. The agreement provided that Mathiasen would "manage and conduct the business of the Government with respect to" the tanker and, to that end, would "equip, fuel, supply, maintain, man, victual, and navigate" the ship. Mathiasen supplied a master and a civilian crew. There is no suggesiton that under this contract the tanker could be or ever was used except in "the business of the Government", more particularly as a naval supply ship. Affirmatively, the court below found that the vessel had most recently delivered and discharged a cargo of jet aviation fuel for the Navy and was proceeding in ballast on another mission as directed by the Navy when the collision occurred.

Relying on these facts, the claimants here argue that Mathiasen was such a "charterer or owner pro hac vice" as under established principles of law must respond in

damages for harm caused by the negligent navigation of the vessel operated by it. Moreover, it is argued that we already have so decided in affirming the district court's refusal to dismiss Mathiasen's limitation petition, 259 F. 2d 608, and later affirming the decision that the dangerous condition and grossly negligent navigation of the ship were such as to deprive both its owner and its operator of the benefit of limited liability. 289 F. 2d 237.

Our earlier decisions in this case neither considered nor foreclosed the contention now made that the relevant federal statutes provide for recovery against the United States as owner of a public vessel and preclude recovery against Mathiasen as operator for the government, even though but for such legislation the operator might also be liable. A petition for limitation of liability, such as Mathiasen filed here neither admits liabilty nor waives any defense. *Smith v. United States,* 4th Cir., 1965, 346 F. 2d 449, *cert. denied* 382 U. S. 878; *Petition of Spearin, Preston & Burrows,* 2d Cir., 1951, 190 F. 2d 684. It is an anticipatory protective measure to avoid full personal responsibility if liability shall later be imposed. Accordingly, the first decision of the district court and our affirmance of it merely recognized that as the person who operated a ship, employing a master and a crew for that purpose, Mathiasen faced sufficient risk of liability for harm caused by that ship to justify it in asking for a limitation of liability. In that connection, we said merely that "responsibility may well be ascribed to Mathiasen". See 250 F. 2d at 611. This in no way precluded Mathiasen from asserting as a defense later, when injured parties attempted to prove their claims against both the United States and Mathiasen, that the controlling statutes made the government exclusively liable for Mathiasen's operation of a public vessel.

Similarly, in later affirming the refusal of the district court to grant Mathiasen limitation of liability we held merely that the dangerous condition and improper naviga-

tion of the naval ship were such as to deprive anyone who might be responsible for her faults, whether the owner or the operator, or both, of the benefits of limitation of liability. Here again, we neither considered nor decided whether, in the circumstances of this case, the controlling statutes permit recovery against both the government and the operator.

This brings us to the merits of the controversy concerning the liability of Mathiasen. As against the United States the claimants necessarily rely upon the Public Vessels Act, 46 U. S. C. §§ 781-790, and its incorporation of the Suits in Admiralty Act, 46 U. S. C. §§ 741-752, as serving to waive sovereign immunity and to permit and regulate libels against the United States for "damages caused by a public vessel of the United States". 46 U. S. C. § 781. But in thus permitting recovery against the United States, Congress has stipulated that "where a remedy is provided . . . [against the United States] it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent . . . of the United States . . . whose act . . . gave rise to the claim". 46 U. S. C. § 745.

Preliminarily, the claimants urge that Mission San Francisco was not a "public vessel of the United States". But for this contention, we would have thought it too clear for serious argument that a ship owned by the United States and used as directed by the Navy for the transportation of military supplies is "a public vessel of the United States". However, we must deal briefly with the contention that the manning and operation of the vessel by Mathiasen, a private corporation, make it something other than a public vessel, presumably a merchant ship. We find no case which supports this view. Certainly the two cited by the claimants do not. One of them, *Calmar S. S. Corp. v. United States*, 1953, 345 U. S. 446, mentions the Public Vessels Act only tangentially. The issue there was whether a privately owned ship operated for hire on a war mission for the United States was "employed as a

merchant vessel", and the Court decided that the ship was so employed. There is no suggestion that in similar circumstances a government owned vessel would be a merchant vessel rather than a public vessel. Equally unhelpful is the claimants' citation of *Geo. W. Rogers Const. Corp. v. United States,* S. D. N. Y. 1954, 118 F. Supp. 927. There a government owned ship operated by "civil service employees of the United States" was found to be a public vessel. But this does not imply, as the claimants argue, that only ships operated by such civil service employees are public vessels. We think government ownership and use as directed by the government exclusively for a public purpose suffice without more to make a ship a public vessel. *Smith v. United States,* 4th Cir., 1965, 346 F. 2d 449, *cert. denied* 382 U. S. 878; *cf. Bradey v. United States,* 2d Cir., 1945, 151 F. 2d 742; *Sbarbaro v. United States,* E. D. Pa. 1953, 112 F. Supp. 93.

Despite the status of the ship as a public vessel, the claimants argue that the statutory provision for exclusive liability of the United States is inapplicable here. It is argued that Mathiasen was not "the agent . . . of the United States . . . whose act . . . gave rise to the claim" within the meaning of section 745 of title 46. Undoubtedly, Mathiasen's faulty navigation of the ship caused the collision. Therefore, the contention must be that Mathiasen was not an "agent of the United States" within the meaning of the statute. Accordingly, we must decide whether in section 745 Congress used "agent" comprehensively to include such a contract operator as Mathiasen was in this case.

As a matter of legal definiton, "agent" of the United States is an appropriate characterization of such a contract operator of a public vessel as Mathiasen. The accepted distinction between "servant" and "independent contractor" may place Mathiasen in the latter category, since it is arguable that Mathiasen's day to day working of the ship was not subject to government control. See RESTATEMENT, AGENCY, 2d, § 2. But an independent con-

tractor, no less than a servant may be an agent in that he is employed as a fiduciary, acting for a principal with the principal's consent and subject to the principal's overall control and direction in accomplishing some matter undertaken on the principal's behalf. RESTATEMENT, AGENCY, 2d, § 14 N.

Certainly, under the contract in this case Mathiasen owed the United States obedience and loyalty and was in significant ways subject to the government's direction and control. Mathiasen expressly agreed "to manage and conduct the business of the Government with respect to such tankers" as the government should furnish "solely in the public use or in the protection of the National interest or economy". The government was to prescribe "voyages and cargoes". While Mathiasen undertook to "man, victual and navigate" the ships, the government was empowered "to terminate the employment of the master or any member of the crew" as the public interest might dictate. Wages of the crew and all costs of operating the ships, though paid by Mathiasen, were reimbursable by the government. We think the general sense and specific details of this agreement disclose a relation of principal and agent within the accepted legal conception of an agency relationship. Another court of appeals has already reached this conclusion in characterizing an identical contract. *Smith v. United States, supra.*

This normal reading and application of the language of the contract is in accord with the manifest intention of Congress. On April 8, 1949, when the legislative proposal that became section 745 was before Congress the Attorney General responded to Congressional solicitation of his views by recommending to the Chairman of the House Committee on the Judiciary that Congress make the remedy granted against the government "exclusive of any other action . . . against any employee, agent or instrumentality . . . acting for or on behalf of the United States in the management and operation of its vessels". See H.

Rep. No. 1292, 81st Cong., 1st Sess., 1949, p. 4; 1951 A. M. C. 151, 154. This language differed from the text of the bill then before Congress in the inclusion of the phrase "or instrumentality" after the word "agent". Thereafter, in reporting the final and present text to the Congress, both House and Senate Committees explained "that the language suggested by the Department of Justice in respect of the exclusive provision constitutes an immaterial variation in the language of the bill as drawn". H. Rep. No. 1292, *supra* p. 5. This indicates that in the Congressional view the general statement of an agency concept as enacted included any instrumentality through and by which public vessels were operated.

Also noteworthy is the language of a proviso to section 745 which implements the declared exclusive liability of the United States by waiving the statute of limitations in certain cases. The scope of the waiver is stated in terms of any situation in which "any person, partnership, association, or corporation, [is] engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States". The proviso, with its quoted coverage of the present type of contract operation, appears to be *in pari materia* with the preceding direction that the liability of the United States be exclusive. Thus, it may reasonably be inferred that the general agency language in the associated clause on exclusive liability covers the same kind of contractual arrangement.

Even more significant is language used in the "Analysis of the Bill" which is part of a second Senate Report on this legislation. It is there stated that the provision that the liability of the United States shall be exclusive "declares the rule announced by the Supreme Court in *Cosmopolitan Shipping Co. v. McAllister* (337 U. S. 783, 1949 A. M. C. 1031), *Caldarola v. Eckert* (332 U. S. 155, 1947 A. M. C. 847), and *Johnson v. Emergency Fleet Corp.* (280 U. S. 320, 1930 A. M. C. 1)." S. Rep. No. 2535,

81st Cong., 2d Sess., 151 A. M. C. 149, 151. The three cited cases, considered together, cover a variety of circumstances in which governmental maritime activity is conducted through private contractors. One of the cases, *Johnson v. Emergency Fleet Corporation*, specifically considers several situations, including that of a contract operator indistinguishable from Mathiasen here, and holds that governmental liability is exclusive. Thereafter, a subsequent decision, unmentioned in the Senate Report, had overruled that part of the *Johnson* holding which covered cases like ours. *Brady v. Roosevelt Steamship Co.*, 1943, 317 U. S. 575. Thus, it is reasonable to infer from the quoted language of the legislative analysis that Congress intended to restore the *Johnson* decision in its entirety and in so doing to make governmental liability exclusive throughout a broad spectrum of contractual arrangements for the operation of public vessels, including the type presented by the Mathiasen contract.

For these reasons we have concluded that, by force of the exclusive liability clause of section 745, any right to recovery against the United States here for injury caused by its public vessel precludes recovery for the same injury against the contract operator whose conduct was the immediate cause of the accident.

It remains to consider the appeals of the United States and Mathiasen from the awards made to the estate of David Black, the radio operator of the public vessel who was killed in the collision. Black's administrator, different from the other death claimants, sought recovery for the economic value of decedent's life under the Delaware Wrongful Death Act, 10 Del. Code Anno. § 3704(b), as well as recovery for the loss to dependents under the Jones Act, 46 U. S. C. § 688. The commissioner awarded $26,575. under the Jones Act and $36,135. under the Delaware Wrongful Death Act, a total of $62,710. The district court, after a discussion in its opinion that suggests liability of the United States under the Delaware Wrongful Death Act

and liability of Mathiasen under the Jones Act, "sustained" the findings of the commissioner and entered judgment against both the United States and Mathiasen for the full amount of $62,710. The appellants now argue that no recovery was permissible against Mathiasen and only Jones Act recovery against the United States.

The United States is suable here because Congress has waived sovereign immunity from liability for damage "caused by a public vessel of the United States". 46 U. S. C. § 781. Accordingly, wherever the faults of a public vessel or its operation are such as would make a private owner liable, personal liability for harm thus caused may be imposed upon the United States. Moreover, as we already have pointed out, if a remedy exists against the United States, section 745 makes that remedy exclusive of any recovery against an agent of the United States whose conduct gave rise to the claim. In this case, the collision was caused by the negligent navigation of a public vessel and resultant damage was multiplied by the dangerous condition of its empty tanks within which highly inflammable gases had been permitted to accumulate and remain. The immediate cause of the collision was the negligent conduct of the contractor Mathiasen to whom the operation of the ship had been entrusted. Thus, if a person injured in the accident has a remedy against the United States, the availability of that remedy precludes recovery against Mathiasen.

Black's claim against the United States under the Jones Act, like the claims made on behalf of the other members of the public vessel's crew who were killed or injured, had been allowed.

But in Black's case, unlike the others, it is now argued that full and proper recovery includes a Jones Act award against Mathiasen and an additional award against the United States under the Delaware Wrongful Death Act.

While in the circumstances of this case the determination of the proper Jones Act respondent is not free from

doubt, we have concluded that the United States is liable to Black's estate and to the others similarly situated under the Jones Act. Difficulty arises because Jones Act recovery is normally allowed only against the complaining seaman's employer, and in this case Mathiasen hired the crewmen and exercised immediate control over them pursuant to a contract with the United States which specified that the members of the crew would be employees of Mathiasen and not of the United States.

The Jones Act does not in terms designate the injured seaman's employer as the person against whom it grants a remedy. However, it does grant the seaman a cause of action for negligent injury in the course of his employment equivalent to that which the Federal Employers' Liability Act, 45 U. S. C. § 51, confers upon railroad workers against their employing carriers. Accordingly, the normal rule is that the seaman's employer, and that employer only, is liable under the Jones Act. *Cosmopolitan Shipping Co. v. McAllister,* 1949, 337 U. S. 783. However, the determination of the proper Jones Act defendant in public vessel cases is affected by the exclusive liability provision of section 745. In that section Congress attempted to resolve uncertainties and confusion whether the United States or its contractual instrumentality could be sued, as reflected in a series of maritime cases, several of them Jones Act cases, from *Johnson v. Fleet Corp.,* 1930, 280 U. S. 320 to *Cosmopolitan Shipping Co. v. McAllister,* 1949, 337 U. S. 783. This was accomplished if section 745 is construed as designating the United States rather than its agent as the entity suable on all claims for harm done by a public vessel as a result of the agent's conduct. *Cf. Richmond Screw Anchor Co. v. United States,* 1928, 275 U. S. 331 (construing and applying a similar provision concerning patent infringement by government contractors). The logical implication of this statutory designation of the party to be held responsible is to impose liability on the United States in Jones Act cases whether it or its operating agent is

conceptually the seaman's employer. *Cf. North Carolina R. R. Co. v. Zachary,* 1914, 232 U. S. 248. Indeed, any other construction would perpetuate the very uncertainty as to whom a seaman should sue for injury caused by a public vessel which Congress has sought to eliminate.

This substitution is fair and reasonable. We are here concerned with the situation of a vessel both owned by the United States and engaged exclusively in the business of the United States. This is quite different from the ordinary demise in which the charterer uses the vessel for his own purposes and the owner has no interest in the activity of the chartered ship. Therefore, even if in a technical view a particular arrangement for the operation of a public vessel may make the contract operator the "employer" of the crew, the vessel and its crew are serving the United States.

In these circumstances the scheme and the remedial purpose of the legislation are best served by construing section 745 as permitting an employer's Jones Act liability to be imposed upon the United States vicariously.

It remains only to consider briefly whether, as against the United States, both Jones Act relief and a recovery under the Delaware Wrongful Death Act are permissible. The short answer is that the Supreme Court has clearly ruled that the Jones Act remedy is exclusive and, when applicable, bars relief against the same defendant under a state wrongful death statute. *Gilliespie v. United States Steel Corp.,* 1964, 379 U. S. 148; *Lindgren v. United States,* 1930, 281 U. S. 38. Thus, Black's estate can recover only under the Jones Act.

On this appeal the consolidated decree will be modified by eliminating all recovery allowed to the several claimants against Mathiasen's Tankers Industries, Inc. and by eliminating from the award to Julius Black as Administrator of the Estate of David B. Black against the United States all recovery allowed under the Delaware Wrongful Death Act, with costs to the appellants.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 15281 and 15294.

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA AND MATHIASEN'S TANKER INDUSTRIES, INC., FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNERS OF THE USNS "MISSION SAN FRANCISCO",

MATHIASEN'S TANKER INDUSTRIES, INC.,
Appellant in No. 15,281,

UNITED STATES OF AMERICA,
Appellant in No. 15,294.

(D. C. No. 1765 in Admiralty)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Present: HASTIE and GANEY, *Circuit Judges,* and CLARY, *District Judge.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that on this appeal the consolidated decree of the District Court, filed December 17, 1964, be and hereby is modified by eliminating all recovery allowed to the several claimants against Mathiasen's Tankers Industries, Inc. and by eliminating from the award to Julius Black as Administrator of the Estate of David B. Black against the United States all recovery allowed under the Delaware Wrongful Death Act, with costs to the appellants.

ATTEST:

IDA O. CRESKOFF,
Clerk.

September 12, 1966.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 842

JULIUS BLACK, ADMINISTRATOR OF THE ESTATE OF DAVID VICTOR BLACK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 960

RUTH ELIZABETH ALLEN, EXECUTRIX OF THE ESTATE OF WILLIAM C. ALLEN, ET AL., PETITIONERS

v.

MATHIASEN'S TANKER INDUSTRIES, INC., AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Delaware is reported at 236 F. Supp. 895. The opinion of the court of appeals is reported at 367 F. 2d 505, and is printed as Appendix C to

the petition in No. 960 and in the Appendix to the petition in No. 842.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1966. The petition for a writ of certiorari in No. 842 was filed on December 8, 1966. The petition for a writ of certiorari in No. 960 was filed on January 10, 1967, the time within which to file such petition having been extended to January 11, 1967, by order of Mr. Justice Brennan. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the operating agent of a United States Navy tanker is an "agent" of the United States within the meaning of the exclusivity provision of the Suits in Admiralty Act (46 U.S.C. 745).

2. Whether a United States Navy tanker, carrying military cargo as directed by the Navy, but operated by a private contractor, is a "public vessel" under the Public Vessels Act (46 U.S.C. 781 *et seq.*).

3. Whether the estate of a seaman on such a vessel has a remedy against the United States under a State wrongful death statute, in addition to a remedy under the Jones Act (46 U.S.C. 688).

STATUTES INVOLVED

Section 5 of the Suits in Admiralty Act (46 U.S.C. 745) in part provides:

> Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a rem-

> edy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel * * *.

Section 1 of the Public Vessels Act (46 U.S.C. 781) in part provides:

> A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States * * *.

STATEMENT

These cases arise out of a collision between the USNS *Mission San Francisco,* a tanker owned by the United States, and the SS *Elna II,* a privately owned vessel. The ships collided in the Delaware River on March 7, 1957; the *Mission San Francisco* was totally destroyed, with a loss of ten lives. The *Mission*

San Francisco was being operated for the United States by Mathiasen's Tanker Industries, Inc., under a cost plus fixed-fee contract with the Military Sea Transportation Service ("MSTS"), an agency of the United States Navy. Petitions for exoneration or limitation of liability were filed by the United States and Mathiasen's, but were denied on the ground that both were responsible for the accident. *Petition of Oskar Tiedemann and Company,* 289 F. 2d 237 (C.A. 3). The United States then conceded its liability to petitioners—crew members of the *Elna II* and the *Mission San Francisco,* or their estates.[1] The questions remaining are whether petitioners may also recover damages against Mathiasen's, and, if not, the proper basis for recovery against the United States.

Mathiasen's operated the *Mission San Francisco* under a standard form contract, entitled "Contract for Operation of U.S. Navy Tankers" (App. 64a–109a).[2] Under Article 1 of the contract, Mathiasen's undertook to "manage and conduct the business in connection with the operation of such tankers as may be furnished to it by the Government from time to time" (App. 66a). Article 1 goes on to require Mathiasen's to authorize the master of the vessel to receive directly and carry out orders and instructions of the Commander, MSTS, "as regards employment of the vessel and prosecution of voyages" (App. 66a–67a). The Commander, MSTS, is required by the

[1] Petitioner in No. 842 is the administrator of the estate of a member of the *Mission San Francisco* crew. Petitioners in No. 960 are members of both crews, or their estates.

[2] "App." refers to Appellants' Appendix in Nos. 15280/81, 15293/94, in the court below, which has been filed in this Court.

contract to issue "operation instructions" to Mathiasen's (App. 66a). Mathiasen's is required to "equip, fuel, supply, maintain, man, victual and navigate" the tankers (App. 69a). The government agrees to reimburse Mathiasen's for all its costs under the contract, to pay a fixed fee as the operator's profit, and to assume the risks of the voyages (App. 76a–86a). The officers and crew of the vessel are declared to be employees of Mathiasen's rather than the United States (App. 70a). The tankers are declared to be owned by the government and to be "public vessels * * * employed solely in the public use or in the protection of the National interest or economy" (App. 67a).

At the time of the collision, the *Mission San Francisco* had most recently delivered and discharged a cargo of jet aviation fuel for the Navy and was proceeding in ballast to pick up further cargo as directed by the Navy.

After the liability of the United States to petitioners under the Public Vessels Act (46 U.S.C. 781 *et seq.*) was determined, the issue remained as to whether petitioners were entitled to recover against Mathiasen's. Petitioners sought to do so, because the Public Vessels Act (46 U.S.C. 782) does not permit pre-judgment interest, while such interest would be allowable against a private party such as Mathiasen's. The district court entered a decree against Mathiasen's which included such interest. 236 F. Supp. 895, 901–903, 910–911. The court of appeals, however, held that Section 5 of the Suits in Admiralty Act (46 U.S.C. 745)—which renders the liability of the United

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States under that Act and the Public Vessels Act[3] exclusive of the liability of its "agent"—precluded any judgment against Mathiasen's.

Alternatively, petitioners in No. 960 contended that the district court erred in entering judgments against the United States under the Public Vessels Act rather than the Suits in Admiralty Act. Again, the crux of the matter is the obtaining of pre-judgment interest, since the Suits in Admiralty Act (46 U.S.C. 745) allows interest from when the claim is filed, while the Public Vessels Act (46 U.S.C. 782) allows interest only from the date of judgment. As to this contention, the court of appeals held that the *Mission San Francisco* was a "public vessel of the United States" within the coverage of the Public Vessels Act, and that that statute governed recovery against the United States.

Finally, petitioner in No. 842 sought to preserve the recoveries he obtained in the district court under both the Delaware Wrongful Death Act (10 Del. Code Ann. § 3704(b)), and the Jones Act (46 U.S.C. 688). On this point, the court of appeals held that the Jones Act recovery against the United States precluded further recovery under a State wrongful death statute.

ARGUMENT

1. Both petitions present the question of whether seamen injured by a vessel owned by the United States, operated for it, and subject to its operational control through a standard contractual agreement

[3] The Public Vessels Act incorporates the Suits in Admiralty Act, with the exception of the pre-judgment interest provision (46 U.S.C. 782).

with an operating agent, have a remedy only against the United States, or whether in addition they have a remedy against the operating agent itself. The rights of the seamen or their estates to recover damages are not affected by this issue, for the United States is clearly subject to direct liability for anything the agent did or failed to do in connection with the operation of the vessel, and has in fact conceded liability to petitioners (see *supra,* p. 4). The only practical consequence of that question here is the collection of pre-judgment interest, which may not be awarded against the United States under the Public Vessels Act. This problem is not likely to arise in the future, since, subsequent to 1960, actions involving public vessels may be brought against the United States under the Suits in Admiralty Act, which permits the awarding of interest from the date of the claim (46 U.S.C. 745).[4]

[4] As originally enacted, the Suits in Admiralty Act was limited to government vessels "employed as * * * merchant vessel[s]" and tugboats (46 U.S.C. 742 (1958 ed.)). Public vessels were separately covered in the Public Vessels Act (46 U.S.C. 781 *et seq.*). Because of uncertainty engendered by the public vessel-merchant vessel distinction (see H. Rep. No. 523, 86th Cong., 1st Sess., pp. 2–3; S. Rep. No. 1894, 86th Cong., 2d Sess., pp. 3–6), Congress in 1960 amended Section 2 of the Suits in Admiralty Act to delete the provision limiting jurisdiction to merchant vessels and tugboats. 74 Stat. 912, amending 41 Stat. 525. The amendment, however, applies only to suits brought after September 13, 1960; the present claims were filed in 1957.

Of course, the question of interest between the date of the accident and the date of the filing of the claim may still arise, since the Suits in Admiralty Act allows interest only from the date of the claim (46 U.S.C. 745). However, the amount involved in such situations is not likely to be large, for the suit

a. As the court of appeals observed, Mathiasen's was obviously an "agent" of the United States in the traditional sense of the word, since it was operating the vessel on behalf of and for the benefit of the government, and subject to the government's instructions. The question here presented is whether the exclusivity provision of the Suits in Admiralty Act uses the term "agent" in a special, limited sense.

Petitioners argue that the term "agent", as used in the statute, does not refer to an "operating agent" such as Mathiasen's, but only to a "general agent" of the type involved in *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U.S. 783 (*i.e.,* an agent "engaged to

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must be brought within two years of the accident. Moreover, a large proportion of a personal injury award typically involves losses accruing after the claim is filed (such as future loss of income). As to such items, interest from the date of the accident would obviously be inappropriate.

The issue raised by the petition may have a practical effect in other cases in two respects. First, the statute of limitations under the Suits in Admiralty Act is two years, while the Jones Act limitations period on actions is three years. Second, the seaman has no right to a jury trial under the Suits in Admiralty Act. As to the jury trial point, however, it should be noted that where there is a limitation proceeding and the claims exceed the limitation fund, all claims would have to be tried in the limitation proceedings if limitation is granted. *Pershing Auto Rentals, Inc.* v. *Gaffney*, 279 F. 2d 546 (C.A. 5); compare *Lake Tankers Corp.* v. *Henn*, 354 U.S. 147. Such a trial would be in admiralty, without a jury, despite the Jones Act. *In re East River Co.*, 266 U.S. 355. On the other hand, if the petition for limitation were denied by the admiralty court—as it was here—the basic question of responsibility for the disaster would be settled by the judgment denying limitation, and only the issue of damages would remain for trial by jury.

No issue relating to statutes of limitations or trial by jury has been raised in the present cases.

take care of the shoreside business of the ship and who has no part in the actual management or navigation of the vessel" (337 U.S. at 796)). The argument is that the statute codified the *Cosmopolitan Shipping* decision, which held that the remedy against the United States as owner of a vessel is exclusive in a "general agent" situation. However, it is clear that the statute was also intended to codify *Johnson* v. *Emergency Fleet Corp.*, 280 U.S. 320, 322–323, 326–327, in which the remedy against the United States under the Suits of Admiralty Act was held exclusive in an "operating agent" situation.[5]

Thus, the legislative history shows that Congress did not intend the term "agent" as used in the statute to mean only the "general agent" involved in the *Cosmopolitan Shipping* decision.[6] This is further evidenced by the fact that the bill as originally introduced specified "a general agent under a general agent service agreement." H.R. 4873, 80th Cong., 2d Sess.;

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[5] See S. Rep. No. 2535, 81st Cong., 2d Sess., pp. 2–3, which states: "The first proviso declares the rule announced by the Supreme Court in *Cosmopolitan Shipping Co.* v. *McAllister* (337 U.S. 783), *Caldarola* v. *Eckert* (332 U.S. 155), and *Johnson* v. *Emergency Fleet Corp.* (280 U.S. 320), that the remedy under the Suits in Admiralty Act is exclusive."

[6] Even if the exclusivity provision were read to have incorporated only the *Cosmopolitan Shipping* case, petitioners' position would not be far advanced. Under that decision the requirement of suing the United States is not confined to the "general agent" situation. The broad test set forth in *Cosmopolitan Shipping* is on "whose enterprise * * * the vessel was" engaged (337 U.S. at 795). As the district court found (236 F. Supp. at 910–911) the *Mission San Francisco* was clearly engaged on an enterprise of the United States Government, since it had just delivered a cargo of jet fuel for the Navy and was proceeding to pick up further cargo.

see H. Rep. No. 2060, 80th Cong., 2d Sess., p. 5. As the bill was finally passed, only the comprehensive term "agent" was used, without limiting language. The distinction between general agents and operating agents had been explicitly made in letters from the Department of Justice reprinted in all of the committee reports. H. Rep. No. 2060, *supra,* at 4; H. Rep. No. 1292, 81st Cong., 1st Sess., pp. 3–4; S. Rep. No. 1782, 81st Cong., 2d Sess., p. 4; S. Rep. No. 2535, *supra,* at 3. Thus, the significance of the change from the specific term "general agent" to the more general term "agent" could not have escaped Congress.

b. The language quoted in the petition in No. 960 (pp. 11–12) from the statement of the Department of Justice regarding the proposed legislation clearly explains that the purpose of the bill to which the statement was addressed (H.R. 4051, 81st Cong., 1st Sess.) was to relieve litigants who had mistakenly sued the general agent. The statement further indicates the Department's view that under existing law the operating agent could be sued. However, the bill which was the subject of the statement contained no exclusivity provision, unlike the statute which was adopted. The Department's statement goes on to suggest that there be added to the bill a provision that the remedy against the United States was exclusive of any other action against any employee, agent or instrumentality "acting for or on behalf of the United States in the management *and operation* of its vessels." S. Rep. No. 2535, *supra,* at 4 (emphasis added). And while this language was not adopted, the present exclusivity provision (*supra,* pp. 2–3) was; and both committee

reports recommending the bill which was enacted observed that "it is believed that the language suggested by the Department of Justice in respect of the exclusive provision constitutes an immaterial variation in the language of the bill as drawn" (H. Rep. No. 1292, *supra,* at 3; S. Rep. No. 1782, *supra,* at 3).

As the petition in No. 960 points out (p. 11), the pertinent Senate Report stated that the bill would not change the existing rights of seamen to sue employers "who operate, under bare-boat charter or similar arrangements, vessels which are merely owned by the Government." S. Rep. No. 2535, *supra,* at 2. However, it is plain that the role of the government in the present case was far more than merely that of an owner who has given a bareboat charter, which is the equivalent of leasing a vessel.[7] As noted previously, the government here retained and actually exercised control over the operation and use of the *Mission San Francisco.*

[7] A bareboat charter, also called a demise, is similar to a lease. Under such an arrangement, the owner's principal obligation is merely to furnish a seaworthy vessel, while the charterer's principal obligation is to pay the hire and to return the vessel at the end of the term of the charter. Gilmore & Black, *The Law of Admiralty* § 4–20 *et seq.* (1957). After World War II, the Government bareboat chartered a number of surplus vessels for private operation. *Id.* at § 11–10. This was the situation to which the Senate Report referred. A charter form generally in use is set forth at 46 C.F.R. 299.82 (1949). Unlike the agreement involved in the present case, this form does not reserve to the government the right to issue operating instructions or to require the vessel to carry government cargo. Instead, the charterer is free to use the vessel for his own business. Under this form of charter, the operator of the vessel is not the government's agent. *Schnell* v. *United States,* 166 F. 2d 479 (C.A. 2), certiorari denied, 334 U.S. 833.

c. There is only one other appellate court decision in point, and, as petitioners concede (Pet. No. 842, p. 11; Pet. No. 960, p. 6), it is to the same effect as the decision below. *Smith* v. *United States,* 346 F. 2d 449 (C.A. 4), certiorari denied, 382 U.S. 878. In *Smith,* the Fourth Circuit construed the identical form of contract to confer on the operating agent an "agent" status for purposes of the exclusivity provision of the Suits in Admiralty Act. Both *Atlantic Coast Line R. Co.* v. *Agwilines, Inc.,* 195 F. 2d 459 (C.A. 5), and *Hanlon* v. *Waterman Steamship Corp.,* 265 F. 2d 206 (C.A. 2), certiorari denied, 361 U.S. 822, which are relied upon by petitioners, held that the exclusivity provision barred recovery against a general agent, but did not involve the question whether the statute applies to operating agents. *Powell* v. *U.S. Cartridge Co.,* 339 U.S. 497, involved different legislation (the Fair Labor Standards Act) and a different form of contract.

In addition, the prior decision of the Third Circuit in the present case, which decided that Mathiasen's was entitled to limitation, is also consistent with the decision below. *In re Petition of the United States,* 259 F. 2d 608 (C.A. 3). The pertinent statute accords the right of limitation to "[t]he charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement." 46 U.S.C. 186. There is no reason why an "agent" within the meaning of the Suits in Admiralty Act cannot meet this definition. Moreover, the determination of whether a party is entitled to petition for limitation is a preliminary matter, and is not intended

to be dispositive of the merits of a defense such as that here involved.

d. The question presented is also of limited potential scope. The Department of Navy advises that, as of December 31, 1966, there were only 20 tankers and 9 other vessels operated for the Navy by private shipping companies pursuant to contract with the MSTS, the civilian complement of the tankers ranging from 41 to 45 crew members and officers on the tankers, and from 40 to 89 crew members and officers on the other vessels.

2. Petitioners in No. 960 argue alternatively that the liability of the United States should have been predicated on the Suits in Admiralty Act, which permits pre-judgment interest, rather than the Public Vessels Act. As we have noted (see note 4, *supra*), this issue is a limited one, in that it relates only to suits brought before the 1960 amendment to the Suits in Admiralty Act, which eliminated the requirement that suits filed under that Act involve vessels "employed as a merchant vessel." 74 Stat. 912, amending 41 Stat. 525.

In any event, the decision below was clearly correct. As the court below pointed out, a ship owned by the United States and used as directed by the Navy for the transportation of military supplies would seem, on the face of it, to be a "public vessel". And this is consistent with *Calmar S.S. Corp.* v. *United States,* 345 U.S. 446, which held that a privately owned and privately operated vessel used as directed by the United States was "employed as a merchant vessel" so as to fall within the coverage of

the Suits in Admiralty Act. The *Calmar* opinion makes it plain that the basis for the decision was the fact of private ownership. This Court reasoned that the fact of private ownership precluded suits under the Public Vessels Act and thus rendered coverage under the Suits in Admiralty Act necessary, if the two statutes were to be construed as comprising a consistent whole (345 U.S. at 454–456).

3. Petitioner in No. 842 contends that he should have been permitted a recovery under the Delaware Wrongful Death Act (10 Del. Code Ann. § 3704(b)), as well as the recovery which he has obtained against the United States under the Jones Act. Since the liability of the United States is exclusive of "any other action by reason of the same subject matter" against Mathiasen's, under 46 U.S.C. 745 (*supra,* pp. 2–3), the contention must necessarily be that recovery under both the federal and State statutes is allowable against the United States. But such a dual recovery is plainly barred by *Gillespie* v. *U.S. Steel Corp.,* 379 U.S. 148, and *Lindgren* v. *United States,* 281 U.S. 38, holding that the Jones Act remedy is exclusive and, when available, prevents relief against the same defendant under a State wrongful death statute. We do not understand petitioner in No. 842 to contend that an award under the Delaware statute against the United States should be substituted for his Jones Act recovery.[8]

[8] If such a contention were made, it would have the effect of denying the seaman any Jones Act recovery (since a Jones Act recovery against the operating agent would be barred by the exclusivity provision of the Suits in Admiralty Act). And while recovery under the State statute would be advantageous

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

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FEBRUARY 1967.

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to the petitioner in No. 842 (since greater in amount), in many cases, where the State statute contains a dollar limitation on wrongful death awards, the seaman's family would be in a better position under the Jones Act, which has no such limitation. Recovery against the United States as the Jones Act employer is supported by the rule under the Federal Employers' Liability Act (45 U.S.C. 51 *et seq.*, incorporated by reference into the Jones Act), that employees of an independent contractor engaged to perform an integral part of the business of operating a railroad, and subject to the railroad's operational control, may recover directly against the railroad as their FELA employer. *Linstead* v. *Chesapeake & Ohio Ry.*, 276 U.S. 28.

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IN THE

Supreme Court of the United States

October Term, 1966.

No. 960.

RUTH ELIZABETH ALLEN, Executrix of the Estate of WILLIAM C. ALLEN, Deceased, and Forty-four Others Herein Specifically Identified,

Petitioners,

v.

MATHIASEN'S TANKER INDUSTRIES, INC., and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 960.

RUTH ELIZABETH ALLEN, EXECUTRIX OF THE ESTATE OF WILLIAM C. ALLEN, DECEASED, AND FORTY-FOUR OTHERS HEREIN SPECIFICALLY IDENTIFIED,

Petitioners,

v.

MATHIASEN'S TANKER INDUSTRIES, INC., AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REHEARING.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Ruth Elizabeth Allen, Executrix of Estate of William G. Allen, deceased and forty-four others specifically identified in the Petition for Certiorari, pray that this Court grant rehearing of its Order of February 20, 1967, denying petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit in the above entitled case, as prayed for in the petition filed January 10, 1967, herein.

The issues presented in the petition for certiorari are of such overwhelming importance and magnitude as, in the normal course, have impelled this Court to invoke its powers of review. It would appear that this Court's failure to do so herein stems from the false impression, conveyed by Respondents' reply to the petition, that the problems involved have been corrected by legislation and that they are

confined to a mere handful of seamen. The truth is that the legislation did not reach the question, and that the issue presently extends to a great percentage, involving thousands, of seamen—which percentage becomes greater every year with the ever-growing interest of the Government in the merchant marine.

At stake is the right to a jury trial, and a verdict for prejudgment interest covering eight years of litigation for 44 claimants.

The respondents urge that Mathiasen Tanker Industries, Inc. was an "agent" within the meaning of the Suits in Admiralty Act and therefore immune from suit for its own torts, leaving a remedy only against the United States. Recognizing the sheer sophistry of its argument on this point, respondents state that there are only about thirty ships involved under contract to the Navy, implying that these are the only ships involved. Not only is this figure challenged, but it is significant that respondents omit mention of the vast number of vessels under contract to other departments of the Government. Moreover, if the Government should take over the Merchant Marine, as it has threatened to do, and contract the vessels out for operation by private shipping companies, then all of the private shipping companies will be immune from suit despite their own personal torts.

Heretofore, private shipping companies have always been responsible for their own torts. If the decision below is permitted to stand, it will be an open invitation to all private shopping companies simply to enter into an operating agreement with the Government in order to escape their traditional responsibilities. Respondents' attempt to minimize the scope of the broad issue should serve to emphasize its really great magnitude. Thousands upon thousands of seamen and other maritime workers will be deprived of jury trials, and the private operators will receive a windfall by escaping prejudgment interest under the immunity given by the decision below.

The insurance companies who underwrite the liability of the private operators and our Government are notorious for procrastinating tactics which protract litigation for an average of five to ten years. The old platitude of justice delayed is justice denied is peculiarly applicable. In addition, expenses which are not recoverable mount up for the distressed litigants, and an award of prejudgment interest is the only remedy available to set off against these losses and against the hardship of an eight-year waiting period, as in the instant case. The claimants are at least entitled to a "time at bat" in this Court before being deprived of these most substantial and much-needed remedies.

Respondents also argue that the amendment of 1960 to the Suits in Admiralty Act made the question moot so far as future cases involving prejudgment interest are concerned. This likewise is an utterly incorrect statement. Respondents base this contention on the 1960 amendment to the Suits in Admiralty Act. That amendment simply deleted the limitation restricting that act to vessels used for commercial purposes. It did not repeal the Public Vessels Act nor did it repeal the provision in that act limiting the payment of interest from the date of judgment rather than from the date suit is started. Respondents will be completely free, in the absence of an expression from this Court, to contend in the future exactly the opposite from what they have represented here to the Court. Indeed, respondents have already taken a firm position that vessels operating under agreements as in this case are public vessels governed by the Public Vessels Act, regardless of the amendment. Respondents' representation to this Court is obviously made for the sole purpose of influencing this Court to deny the Petition for Certiorari despite the expressed intention to do the contrary.

The inference is also advanced that the 1960 amendment permits the seamen to sue the private shipping companies under the operating agreements. This is also an incorrect assumption. The 1960 amendment has absolutely

nothing to do with this issue. Respondents have made this abundantly clear in the position they have taken in other cases. Respondents continue to seek immunity for these operating agents regardless of the amendment, and if the decision below is not taken for review by this Court, respondents will have won a victory by talking out of both sides of their mouths.

The operating agreement requires the private shipping company—as Mathiasen here—to procure insurance to cover all liability for personal injury. It is, thus, the insurance company which gains the windfall, and the operating company gains also by reduced insurance premiums—all at the expense of the injured claimants.

No Court has stated that the 1960 amendment supports the implications made by respondents. If respondents' interpretations are to be given any consideration, this Court should open the matter for review and consider the arguments of claimants as well.

The issues involved in this proceeding are not only of the greatest magnitude, but, contrary to the respondents' representations to this Court, they unquestionably will grow and become more widespread and more prejudicial to an ever-increasing number of seafaring personnel. Certiorari is fully warranted in this case where the principles involved will adversely affect countless seamen.

CONCLUSION.

For the reasons here set forth and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Counsel for Petitioners.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of this Court.

Counsel for Petitioner.